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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) [1] is reported at 531 F. 2d 196. The order of the court of appeals (Pet. App. A) denying the government's petition for rehearing, with a suggestion for rehearing *en banc*, is unreported. The opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. D) are unreported.

[1] "Pet. App." refers to the separately-bound appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976. A timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.

2. Whether respondent was deprived of his Sixth Amendment right to a speedy trial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

Respondent was charged with the first-degree murder of his wife and two daughters, in violation of 18 U.S.C. 1111, in an indictment returned on January 24, 1975, by a grand jury of the United States District

Court for the Eastern District of North Carolina. On July 28, 1975, the district court denied respondent's motions to suppress evidence and to dismiss the indictment (Pet. App. 44a–50a). Respondent appealed, and the government moved to dismiss the appeal for lack of jurisdiction. On August 15, 1975 (three days before trial was scheduled to begin), the court of appeals entered an order permitting the appeal and staying respondent's trial (Pet. App. 42a–43a). On January 23, 1976, the court of appeals reversed and remanded with directions to dismiss the indictment on the ground that respondent had been denied his Sixth Amendment right to a speedy trial (Pet. App. 3a–28a).

1. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and his two daughters, Kimberly and Kristen, aged five and two, were bludgeoned and stabbed to death at respondent's quarters on the Fort Bragg military reservation in North Carolina. Respondent, a Captain in the Army Medical Corps assigned to the "Green Berets," telephoned the military police at 3:40 a.m. for assistance (A.615).[2] Clad only in his blue pajama bottoms,

[2] "A." refers to the appendix to respondent's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The summarized testimony of the witnesses at the Army Article 32 investigation, prepared by the investigating officer, appears at A.615–652. As reflected in the index found at A.666, the verbatim transcripts are referred to as exhibits E–1 to E–57. References to the verbatim record rather than to the summary will be cited by the pages of the transcript (*e.g.*, E–1, at 5). Documentary exhibits are indexed at A.581–586 and A.656–662. Government exhibits are referred to by the letter "G" and defense exhibits by the letter "D."

respondent informed the police that he and his family had been attacked by four assailants (G–4, at 1). Shortly thereafter, Army Criminal Investigation Detachment (C.I.D.) Duty Agent William F. Ivory arrived at the scene as respondent was being removed to the hospital. Agent Ivory walked through the apartment, observing the bodies and the blood-stained walls and floors (E–21, at 632–637); he removed a torn and bloody blue pajama top that had been draped on the chest of respondent's wife and a Hilton bathmat that was resting on her abdomen (A.628).

As the body of respondent's wife was being lifted from the floor of the master bedroom onto a stretcher, Agent Ivory noticed a blue thread adhering to a clot of blood on the rug where her head had rested. This discovery prompted a search by C.I.D. personnel for other blue threads and yarns inside and outside respondent's quarters. More than one hundred blue threads and yarns, identical to those of respondent's blue pajama top, were ultimately collected from various rooms in and from the area immediately outside the house: more than 70, including approximately 30 from the spot where the body of respondent's wife had been found, were discovered in the master bedroom; 19 were uncovered from the bedding in which Kimberly's body had been wrapped; three were removed from Kristen's bedding; two were taken from a wooden club lying just outside the utility room door; significantly, no threads were found in the living room where respondent claimed that he had been violently

attacked and that his pajama top had been torn (A.628–629; E–3, at 400; E–21, at 657; G–7; G–20; G–21; G–22; G–24; G–26).

The bodies of respondent's wife and children were immediately autopsied (A.625–626). Pathologists determined that although Colette and Kimberly had sustained severe blunt trauma injuries to the head before death, all of the victims had died from multiple deep penetrating stab wounds.[3] It was also determined that respondent and each of the victims had a different blood type, thus facilitating the investigators' recreation of the murders and of respondent's movements. Furthermore, C.I.D. agents and laboratory technicians engaged in a painstaking analysis of the crime scene over five continuous days, photographing, dusting, and collecting all real evidence found in respondent's quarters (G–98; D–25; D–26; D–27).

Respondent was interviewed by several law enforcement officers on the morning and afternoon following the murders. He reported that at least four intruders had entered his home, that the assailants had encountered him in his living room and had struck him with a bludgeon, that he had heard his wife and older daughter screaming but had lost consciousness, and that when he awoke he had found his family dead (G–76, at 1–5). Respondent also provided a detailed account of his actions upon discovering the bodies, including the statement that he had removed his pa-

[3] Respondent's wife had suffered 16 elliptical stab wounds and 21 puncture wounds to the chest (A.625).

jama top and had covered his wife's body with it and with a Hilton towel (G–76, at 3; G–101, at 4–9).

By April 6, 1970, after an intensive but incomplete investigation had been conducted, it had become apparent to C.I.D. agents that many aspects of respondent's version of the attack and of his actions after regaining consciousness were inconsistent with the laboratory analysis of the physical evidence. For example, although respondent alleged that he had been stabbed in the right chest, and although he had in fact suffered an incision and a partially collapsed right lung (A.621), there was no hole in the right front portion of his pajama top to correspond to that wound (G–74); although respondent had not sustained any stab wounds to his back (D–28), more than 30 punctures were visible on the rear panels of his pajama top (G–19); although respondent alleged that he had been violently assaulted in his living room (G–76, at 2; G–101, at 4), no seam threads or fabric yarns from his pajamas were uncovered in a minute, pile-by-pile examination of the living room rug (G–7; E–21, at 661); although respondent alleged that he had been attacked with a wooden club (G–101, at 1), no splinters from the club were found in the living room despite the fact that they were discovered in the bedrooms (E–21, at 400), nor was there any trace of blood on the couch, walls, floor or rug in the area of his alleged attack (G–7; G–24; E–8, at 447, 469–470); although respondent alleged that he had not been wearing his pajama top when he inspected Kimber-

ly's body (G–101, at 7), the garment bore stains of Kimberly's blood (G–7); although respondent alleged that his pajama top had been torn in a struggle in the living room (G–101, at 4), the pocket of the pajama top was found near his wife's body in the master bedroom (E–21, at 660) and flecks of Colette's blood were discovered on the pocket of the pajama (G–7); and although respondent alleged that he had not been wearing his eyeglasses either when assaulted or at any time thereafter (G–101), investigators found his glasses lying on the floor of the living room, with Kristen's blood on the surface of the lens touching the floor.

Based on these and other discrepancies in his story and on additional evidence, respondent was advised of his rights on April 6 and was warned that he was a suspect. Later on that day, respondent's immediate commander, Col. Francis B. Kane, Jr., relieved respondent of his medical duties and restricted him to the military reservation on condition that he be escorted by another officer when not in his quarters. Several weeks thereafter, on May 1, 1970, Col. Kane formally preferred criminal charges against respondent, pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 7a).

As required by Article 32 of the U.C.M.J., 10 U.S.C. 832,[4] an Investigating Officer, Col. Warren V.

[4] Article 32, U.C.M.J., 10 U.S.C. 832, provides:

"(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This in-

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Rock, was appointed to investigate the matter and to recommend whether the charges (three specifications of murder, in violation of Article 118 of the U.C.M.J., 10 U.S.C. 918) should be referred by the General Court-Martial Convening Authority (the post commander) to a general court-martial for trial. At the hearing held pursuant to Article 32, the government presented 27 witnesses and respondent 29, the ma-

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vestigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

"(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

"(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

"(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

jority of whom were character witnesses. Respondent also testified, repeating his previous recollection of the events of February 17, 1970, including the assertion that his pajama top had been ripped in the living room by his assailants and that he had placed it on his wife's chest upon finding her body in the master bedroom (Pet. App. 7a–8a; A.643).

At the conclusion of the Article 32 proceeding, Col. Rock filed a report recommending that the charges against respondent be dismissed but that further investigation of the crime by the appropriate civilian authorities be undertaken (Pet. App. 8a). This recommendation was forwarded to Maj. Gen. Edward M. Flanagan, Jr., Commanding General of the unit to which respondent was assigned, who on October 23, 1970, dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial (*ibid.*). See ***Manual for Courts-Martial, United States*** ¶ 33f (Rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship.

2. Following respondent's release from the military, the Department of Justice requested the C.I.D. to continue its investigation. During the ensuing year, the C.I.D. conducted a total of 699 interviews or reinterviews in 30 states and several foreign countries (Pet. App. 9a). In addition to following leads furnished by respondent and others, the C.I.D. engaged in numerous forensic tests, including a comprehensive effort to identify all foreign objects found at the scene of the crime (*e.g.*, hairs and fibers, fingerprints, paint, wood, knives, wax). These investigative efforts

were recounted in a massive, thirteen-volume report, which was transmitted to the Department in June 1972. After the raw report had been examined by several persons within the Department,[5] the C.I.D. was requested to investigate undeveloped and newly-developed leads. After additional interviews and scientific tests, the C.I.D. forwarded supplemental reports on November 9, 1972, and August 20, 1973 (Pet. App. 9a).

In late May 1974, after further study, the government determined that many unanswered questions in the complex case could only be resolved by use of the broad investigative powers of the grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was impanelled to investigate the murders fully. During the next several months, some 75 witnesses, including respondent, were called to testify, while the F.B.I. undertook an extensive reinvestigation of the crime that included exhumation of the victims to obtain hair samples.[6] This renewed inquiry established that there was probable cause to believe that respondent had killed his family and had staged the murder scene to cover up his crime (Pet App. 7a, 9a).

3. Respondent was indicted for the murders on

[5] Contrary to the court of appeals' statement (Pet. App. 9a), the C.I.D. report recommended not respondent's prosecution but further investigation.

[6] The grand jurors also inspected respondent's quarters on Fort Bragg, where the murders occurred. These quarters were seized on February 17, 1970, and have remained sealed to this day.

January 24, 1975. On July 28, 1975, the district court denied respondent's pretrial motions to dismiss the indictment on several grounds, including double jeopardy and denial of a speedy trial.[7] Relying on *United States* v. *Marion*, 404 U.S. 307, the court concluded (Pet. App. 49a) that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned."

The court of appeals, with one judge dissenting, reversed and remanded with directions to dismiss the indictment. Although recognizing that interlocutory orders in criminal cases are generally not appealable, the court, relying upon its decision in *United States* v. *Lansdown*, 460 F. 2d 164, held that post-trial consideration of respondent's double jeopardy claim "could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial" (Pet. App. 5a). In addition, the court held that respondent's speedy trial claim was a proper subject for interlocutory review because it involved "a fundamental constitutional right," was "[p]endent to the double jeopardy claim, and closely related to it," and could

[7] On May 30, 1975, the district court had denied respondent's motion for a change of venue to the Central District of California. The court of appeals dismissed respondent's appeal from this order (C.A. 4, No. 75-1621, decided July 1, 1975, certiorari denied, 423 U.S. 926) and denied his petition for a writ of mandamus to compel the district court to grant the change of venue (C.A. 4, No. 75-1681, decided July 15, 1975, certiorari denied, 423 U.S. 927).

"be decided without considering the merits of the charges against [respondent]" (*ibid.*).[8]

On the merits, the court of appeals concluded that respondent had been denied his Sixth Amendment right to a speedy trial. The court viewed Col. Kane's preferral of criminal charges against respondent in May 1970, and the contemporaneous restriction of respondent's liberties, as "the functional equivalent of a civilian arrest warrant." It concluded that the protections afforded by the Sixth Amendment were activated as of that date and that the delay of more than four and one-half years between respondent's accusation and his indictment was of sufficient length to require application of the balancing analysis outlined in *Barker* v. *Wingo,* 407 U.S. 514 (Pet. App. 13a–20a). Although the court of appeals conceded that the government had not deliberately delayed in order to hamper the defense, it nevertheless determined that at least two years of the delay were attributable either to "indifference, negligence, or ineptitude" (*id.* at 23a), that respondent had "consistently expressed a desire to have the case resolved" and had "reasonably asserted his right to a speedy trial" (*id.* at 24a), and that respondent had been prejudiced by the delay because he "has had to live with the constant threat of a new prosecution," "has been required to

[8] The court also ruled that in view of its acceptance of the appeal on the double jeopardy and speedy trial issues, it would consider as well the other questions that respondent had sought to appeal (composition of the grand jury, alleged prosecutorial misconduct, discovery, and suppression of evidence), since those questions, "if not now presented, might occasion further delay in terminating this litigation" (Pet. App. 4a, n. 3).

retain counsel at his own expense, and * * * has suffered anxiety concerning the unresolved nature of the case." Finally, the court stated, without specifying particulars, that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 25a).

Judge Craven dissented. He disputed the court's conclusion that respondent had been subjected to the civilian equivalent of an arrest in May 1970, finding that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which "warrants an application of the sixth amendment's speedy trial guarantee" (Pet. App. 32a). In any event, Judge Craven reasoned that since all military charges against respondent had been dismissed in October 1970, and since respondent had "stood under no 'public accusation' " or other disability during the four-year period prior to his indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment was unsupportable (*id.* at 32a–38a). Judge Craven viewed respondent's claim as one of pre-indictment delay, which he found unpersuasive in the absence of concrete evidence of actual prejudice to respondent (*id.* at 40a–41a).[9]

[9] On April 30, 1976, the court of appeals denied the government's petition for rehearing *en banc* by a 3–3 vote. Chief Judge Haynsworth, Judge Craven and Judge Widener would have granted rehearing "for the reasons stated in Judge Craven's dissenting opinion" (Pet. App. 2a).

REASONS FOR GRANTING THE WRIT

1. The question whether the courts of appeals have jurisdiction under 28 U.S.C. 1291 to hear interlocutory appeals in criminal cases is one that this Court has already determined to be of sufficient importance to warrant its attention. *Abney* v. *United States*, No. 75–6521, certiorari granted, June 14, 1976, presents the question whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the defendant prior to trial.

Our memoranda in *Abney* and in *Barket* v. *United States*, No. 75–1280, which raises the identical issue, set forth the reasons why 28 U.S.C. 1291 should not be construed to permit appeal of interlocutory orders in criminal cases.[10] We recognized, however, that since one of the primary interests protected by the Double Jeopardy Clause is avoidance of the trial itself, there may be plausible arguments why a limited exception to the general principle of nonappealability should be countenanced for such claims. While we believe that these contentions are outweighed by other jurisprudential considerations, elaborated in our memorandum in *Barket*, that militate against allowing a piecemeal appeal, double jeopardy orders may nevertheless present a unique aspect of the more general problem illustrated by this case. Indeed, the instant case is an apt example of our observation in *Barket* (Memorandum at 13 and n. 16) that once pretrial appellate review of double jeopardy claims is accepted, some

[10] We are providing respondent's counsel with a copy of our memoranda in these cases.

courts may be quick to extend the practice beyond cases involving only that particular constitutional provision.

This case, then, presents an opportunity for the Court to consider the vexing and important question of the propriety of interlocutory criminal appeals in a context not complicated by the special circumstances that may obtain in cases involving double jeopardy claims.[11] The protections afforded by the Sixth Amendment would not be "lost, probably irreparably" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546) unless the validity of the claim were determined prior to trial. The speedy trial provision is unique among the provisions of the Bill of Rights in that it is as much designed to foster the interests of society in the expeditious disposition of pending criminal charges as to confer protection upon individual defendants. *Barker* v. *Wingo, supra*, 407 U.S. at 519–522. Furthermore, the individual interest that is implicated by the provision is not the avoidance of any trial, but the diminution of the risk of conviction based on memories dimmed by the passage of time (see *United States* v. *Ewell*, 383 U.S. 116, 120), plus the interest, shared with society at large, that pending accusations be resolved with due expedition. This complex of interests is fully served by reversal of any conviction procured after a period of unconstitutional

[11] Although the court of appeals termed respondent's Sixth Amendment claim as "pendent" to his double jeopardy claim (Pet. App. 5a), it viewed both as independently appealable prior to trial. This conclusion is supported by the court's determination not to address respondent's claim of double jeopardy in light of its disposition of the case (*id.* at 28a).

delay; accordingly, no policies would justify allowance of interlocutory appeals in cases of this type. Moreover, the analysis required of an appellate tribunal when a speedy trial claim has been raised is most effectively accomplished after a complete presentation of the facts. See *Barker* v. *Wingo, supra,* 407 U.S. at 530–532.

Review of the jurisdictional issue in this case is therefore clearly warranted in light of *Abney*. If the Court rules that the pretrial order in *Abney* is not appealable, it would of course follow that the court of appeals lacked jurisdiction to determine respondent's interlocutory appeal. If, however, the Court holds that the denial of a motion to dismiss on double jeopardy grounds is subject to review prior to trial, this case affords an excellent vehicle in which to explore whether that principle of interlocutory appeal in criminal cases should be extended to other types of claims that, if accepted, would bar a defendant's prosecution.[12]

[12] The court of appeals purported to assume jurisdiction over respondent's appeal because of "the extraordinary nature of [his] case" (Pet. App. 5a). Since the appellate jurisdiction of the courts of appeals under 28 U.S.C. 1291 is non-discretionary, we question whether this is a workable limitation on a defendant's right to interlocutory review. Indeed, the Fourth Circuit recently assumed jurisdiction over another pretrial appeal on speedy trial grounds due to the "exceptional circumstances of the case." See *United States* v. *Piluso*, No. 76–1274, motion to dismiss appeal denied, March 31, 1976. Moreover, even if the courts of appeals were empowered to refuse to hear an appeal that did not present an "extraordinary circumstance," substantial delay would still be occasioned by defendants' attempts to secure review while their trials are pending.

2. In holding that the speedy trial provision of the Sixth Amendment precludes a prosecution of respondent for the murder of his family, despite the fact that his trial was scheduled to begin less than seven months after his indictment, the court of appeals has seriously misconstrued this Court's decisions in *United States* v. *Marion, supra,* and *Dillingham* v. *United States,* 423 U.S. 64. What is more, by including in its speedy trial calculations the period from October 1970 to January 1975, during which time respondent was not under arrest, indictment, or any other legal disability, the court of appeals has taxed the government heavily for having conducted an exhaustive criminal investigation and for withholding charges until all avenues of inquiry, favorable as well as unfavorable to respondent, had been explored. If allowed to stand, this decision will have a substantial detrimental impact on the effective administration of the criminal laws.

a. In *United States* v. *Marion, supra,* and *Dillingham* v. *United States, supra,* this Court held that the right to a speedy trial guaranteed by the Sixth Amendment is activated only by the formal accusation of a crime, either by indictment, information, or arrest. As was explained in *Marion* (404 U.S. at 320):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily

> understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

See also 404 U.S. at 321 and n. 13. A necessary consequence of this rationale is that the right to a speedy trial is not implicated in the period after the charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or suffers interference with his liberties; necessarily, there can at that stage be no Sixth Amendment obligation upon the government to bring to trial expeditiously a person against who no criminal charges are outstanding.

The decision of the court of appeals erodes these heretofore settled principles. In calculating the delay underlying respondent's Sixth Amendment claim, the Fourth Circuit held that the right to a speedy trial had been triggered by respondent's military arrest in May 1970 [13] and had proceeded unabated until the date of his scheduled trial in August 1975—this despite the

[13] As Judge Craven's dissent indicates (Pet. App. 38a–40a), the court's threshold determination that respondent was arrested in May 1970, within the meaning of *Marion*, is not free from doubt. Although respondent's liberties were restricted, the military may of course impose restrictions upon its officers even in the absence of criminal charges. Cf. Art. 92 on the U.C.M.J., 10 U.S.C. 892. Furthermore, Col. Kane stated that he ordered respondent held in lieu of arrest (see Reh. App. 5–6), and respondent was never taken into custody but was allowed to engage in military duties and to take escorted and unescorted trips away from the reservation during the period of the Article 32 inquiry (Reh. App. 13–15). ("Reh. App." refers to the appendix to the government's petition for rehearing, with suggestion for rehearing *en banc*, in the court of appeals, a copy of which is being lodged with the Clerk of this Court.) We are not, however, seeking review of this issue, which essentially raises a factual question, and we therefore assume for purposes of this petition that respondent was arrested in May 1970.

> fact that the Army had dismissed all charges against him in October 1970, that respondent had been honorably discharged from the military two months thereafter, and that he had been free from "the actual restraints" imposed by his arrest or from any other legal disabilities during the next four years.

This result represents a marked departure from the standards outlined in *Marion;* it is a result that is contrary to the reasoning recently adopted by Congress in the Speedy Trial Act of 1974 (18 U.S.C. (Supp. IV) 3161(h)(6)) and by other legal authorities; [14] and it is a result that threatens a significant and wholly unjustified disruption in the enforcement of the criminal laws by requiring the government either to afford persons "not the subject of public accusation" (*United States* v. *Marion, supra,* 404 U.S. at 321) a speedy trial or to forego future prosecutions. Moreover, it is a result that is flatly inconsistent with

[14] See, *e.g.*, American Bar Association, *Standards Relating to Speedy Trial* §§ 2.2(b), 2.3(f) (App. draft 1968). Indeed, although the government conceded in its memorandum in *Dillingham* (No. 74–6738) that the court of appeals may have misapplied *Barker* v. *Wingo* by failing to consider the delay between the defendant's arrest and his indictment, we noted in addition (p. 7, n. 5): "Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis."

the view expressed by the District of Columbia Circuit in *United States* v. *Bishton,* 463 F. 2d 887. There, the defendant had been reindicted after the initial charges against him had been dismissed on jurisdictional grounds. In rejecting the claim that defendant's second prosecution violated his right to a speedy trial, the court declined to consider the period after the first prosecution had been terminated but before the second had begun (463 F. 2d at 891):

> While the record supplies no explanation for this delay, it is significant that during this time appellant was a free man against whom no prosecution was pending. The Supreme Court has recently held that the right to speedy trial attaches when a prosecution has begun, either by indictment or by the "actual restraints imposed by arrest." United States *v.* Marion, 404 U.S. 307, 320 * * *. While it is true that one prosecution for the offense began in April, 1969, that prosecution was finally terminated by the DCCA in April, 1970; and the rationale of *Marion,* although perhaps not applying with the same force, has relevance to the period between the end of one prosecution and the beginning of another, even when the two arise from the same occurrence. When a citizen stands neither arrested nor indicted for an offense, he "suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer." United States *v.* Marion, *supra,* at 321 * * *.

The decision below also conflicts with *United States* v. *Flores,* 501 F. 2d 1356, where the Second Circuit concluded that the delay in indicting a defendant after the complaint against him had been dismissed was irrelevant in assessing whether he had been denied his right to a speedy trial. 501 F. 2d at 1359–1360.[15]

The sole considerations offered by the court of appeals to support its anomalous result were that, during the period after the conclusion of the Army's investigation but prior to the return of the indictment, respondent remained under suspicion for the crime, was required by prudence to retain counsel for his continuing defense, and was subject to the anxiety of the threat of a prosecution (Pet. App. 17a). But precisely the same factors will concern an individual who, although not yet arrested or indicted, knows that he is the subject of a serious and lengthy criminal investigation; recognizing that, the Court in *Marion* nevertheless expressly declined to extend the Sixth Amendment's protections to that situation. 404 U.S. at 321.[16] If the

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[15] *Flores* involved an application of the district court's prompt disposition rules, rather than a direct holding on a constitutional speedy trial claims, as here. However, the purpose of those rules is to implement the Sixth Amendment's speedy trial requirement (cf. *United States* v. *Marion*, *supra*, 404 U.S. at 318–319 and n. 10), and it is plain that the analysis of the court in *Flores* is fully applicable to cases such as the instant case and would necessitate a result contrary to that reached by the court below.

[16] Indeed, the defendants in *Marion*, like respondent, had been aware of their status as criminal suspects well in advance of their formal indictment. See 404 U.S. at 309.

Nor is the court of appeals' conclusion supported by *Klopfer* v. *North Carolina*, 386 U.S. 213. As Judge Craven pointed out in

extension of the speedy trial provision, rejected in *Marion* as to persons under no formal accusation of crime, is to be applied to persons against whom all pending criminal charges have been dismissed, we submit that the innovation is of such fundamental importance that it should be announced by this Court alone.

b. The conclusion that respondent's rights under the Sixth Amendment have not been infringed does not mean that the five-year period of pre-indictment delay is beyond judicial scrutiny. As the Court noted in *United States* v. *Marion*, *supra*, 404 U.S. at 324, and as Judge Craven correctly observed in dissent (Pet. App. 40a–41a), the proper inquiry is one of due process under the Fifth Amendment. Specifically, this Court referred approvingly in *Marion* to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's right] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

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dissent (Pet. App. 37a), the distinction that the majority acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period" (*id.* at 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* (see 386 U.S. at 221–222) and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Sixth Amendment provision. See 404 U.S. at 320. Unlike respondent, Klopfer formally remained "the subject of public accusation" during the period of delay.

Although the court of appeals failed to undertake this analysis, the record reflects that respondent could not have sustained his burden under either branch of the *Marion* test. First, while we have previously argued that determinations of prejudice should not be attempted prior to trial,[17] this is not a case in which prejudice may properly be presumed. The government's case is composed primarily of physical evidence, scientific testimony, and the logical inferences to be drawn therefrom, none of which is impaired by the passage of time. Moreover, respondent's defense is dependent upon his own testimony rather than an alibi or the testimony of others, and he has never claimed an inability to recall events of the night in question. Indeed, respondent has presented essentially the same version of the events from his initial interview on February 17, 1970, to his appearances before the grand jury in 1974 and 1975. There are no missing or dead witnesses, and all prior statements in the case have been transcribed and preserved. To the extent that witnesses' memories may have weakened over time, this factor would affect the government as well as respondent—and the government must bear the burden of proving guilt beyond a reasonable doubt.

Nor, as the court of appeals acknowledged (Pet. App. 20a), was the delay here attributable to a deliberate attempt to hamper the defense. As we have previously noted, see pp. 9–10 *supra*, large portions of

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[17] A discussion of the dangers inherent in a pretrial resolution of the due process question is contained in the government's petition for a writ of certiorari in *United States* v. *Lovasco*, No. 75–1844, a copy of which is being furnished to counsel for respondent.

the five-year hiatus between the crimes and the indictment were spent in exhaustive investigations of the case and appraisals of the evidence by the C.I.D. and the Department of Justice. Additionally, the probative value of certain evidence obtained at the outset of the inquiry was not immediately apparent. For example, although respondent alleged that his pajama top had been ripped by his attackers in the living room of his quarters and that he had subsequently placed the garment atop his wife's body, it was not until July 1971 that the F.B.I. laboratory determined that respondent's wife's blood had stained the pajama top before it was torn. Similarly, not until three years later, in October 1974, did the F.B.I. discover that if Colette MacDonald's body were to be covered with respondent's pajama top in a certain manner, the puncture holes in the pajama would correspond precisely to the ice pick wounds sustained by her chest. See p. 5, n. 3, *supra*.

The Fourth Circuit correctly noted (Pet. App. 21a) that two years elapsed between the receipt of the C.I.D. report by the Department of Justice in 1972 and the initiation of grand jury proceedings in 1974. But the failure of the government to have proceeded with the dispatch deemed desirable, in retrospect, by the court of appeals does not render the pre-indictment delay here unreasonable. As we have explained in our petition in *Lovasco*, the preclusion of prosecution of a defendant whose guilt may be capable of establishment beyond a reasonable doubt is a grave step—one that should not be taken on the basis of judicial second-guessing of the quality of the investigation conducted

by the executive branch, but that can be justified only upon a showing that the delay in reaching a prosecutorial decision was fundamentally unfair and violated the defendant's right to due process of law. This Court noted in *United States* v. *Ewell*, *supra*, 383 U.S. at 122, that "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." The decision of Congress that an indictment for first-degree murder may be brought at any time (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of that offense is so substantial that prosecution is to be permitted regardless of the passage of time. Since the pre-indictment delay in this case did not violate the Fifth Amendment, the court of appeals' inquiry should have ended and this case should have proceeded to trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, submits this supplemental memorandum to discuss the applicability of the Court's recent decisions in *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, and *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, to this case.

1. In *Abney* v. *United States, supra,* the Court held that a pre-trial order denying a defendant's motion to dismiss an indictment on double jeopardy grounds was a "final decision" within the meaning of 28 U.S.C. 1291 and, hence, was immediately appealable. The Court's decision stressed the unique nature of a double jeopardy claim, noting that the validity of such a claim is independent of the merits of the charge against the defendant and that the Double Jeopardy Clause is designed to "protect[ ] an individual against more than being subjected

to double punishments. It is a guarantee against being twice put to *trial* for the same offense" (slip op. 9). The Court observed (*id.* at 10):

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, the conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Although the Court in *Abney* therefore recognized an exception to "the normal rule of finality" (slip op. 11) before an appeal in a criminal case could be taken, it carefully limited the scope of the exception. Interlocutory appeals are not permissible to challenge orders, such as the denial of a motion to dismiss an indictment for failure to state an offense, that "may be reviewed effectively, and, if necessary, corrected if and when a final judgment results" (slip op. 12). Moreover, *Abney* holds that the courts of appeals are without "pendent jurisdiction" to review issues that are not collateral—that is, issues not permeated by "special considerations" justifying an interlocutory appeal may not receive appellate consideration prior to trial even if they are joined to a double jeopardy claim. *Id.* at 11.

2. In light of the Court's holding in *Abney*, the court of appeals erred in assuming jurisdiction over respondent's appeal from the pre-trial order denying his motion

to dismiss the indictment on speedy trial grounds.[1] The protections afforded by the Speedy Trial Clause would not be "lost, probably irreparably" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546) unless the validity of the claim were determined before trial. Unlike the Double Jeopardy Clause, the interest implicated by the Speedy Trial Clause is not the avoidance of the trial itself, but rather the avoidance of unnecessary and unjustifiable delays between accusation and trial. Moreover, unlike the double jeopardy ban, the speedy trial command of the Sixth Amendment is not exclusively a personal right of the defendant, but is also designed in important part to serve societal interests that exist "separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519.

The policies that underlie allowance of an immediate appeal in the case of double jeopardy claims, where a post-trial appeal cannot fully vindicate the interests involved, thus have no application to speedy trial contentions. Indeed, interlocutory appeals of speedy trial claims would undermine the very goals that the constitutional provision is designed to achieve, because the appeal will in most instances simply add to the length of the pre-trial delay.[2]

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[1]The opinion below is somewhat ambiguous as to whether the court of appeals viewed respondent's speedy trial claim as "pendent to [his] double jeopardy claim" (Pet. App. 5a) or as independently appealable. See also Br. in Opp. 33-34 ("[t]he court of appeals allowed Dr. MacDonald to pursue an interlocutory appeal on speedy trial grounds only after it had first determined that the claim was inextricably tied to his double jeopardy claim"). We believe that it is clear from *Abney* that neither rationale sustains the assertion of jurisdiction.

[2]Moreover, while double jeopardy claims raise issues wholly distinct from those to be considered at the trial, speedy trial claims require consideration of, among other factors, the prejudice that the

3. Since the decision in *Abney* clearly indicates that the court below lacked jurisdiction to consider respondent's appeal from the district court's order denying his motion to dismiss the indictment for denial of a speedy trial,[3] we believe that the judgment of the court of appeals should be

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delay has caused to the ability to mount a defense. The extent and significance of such prejudice rarely can be determined in the absence of a trial. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532. Thus, pre-trial appellate review of speedy trial claims will in many cases necessarily be premature.

A related recognition of this distinction between double jeopardy and speedy trial claims exists in the different treatment accorded the contention that such claims are waived by pleas of guilty. While such a plea does not preclude subsequent assertion on appeal of a double jeopardy claim (*Menna* v. *New York*, 423 U.S. 61), it has been consistently held that a plea of guilty waives defects such as pre-indictment delay and the denial of a speedy trial. See, *e.g.*, *United States* v. *O'Donnell*, 539 F. 2d 1233, 1236-1237 (C.A. 9), certiorari denied, No. 76-234, November 16, 1976; *Speed* v. *United States*, 518 F. 2d 75, 77 (C.A. 8), certiorari denied *sub nom. Camp* v. *United States*, 423 U.S. 988; *Karcher* v. *Wainwright*, 476 F. 2d 179, 180 (C.A. 5); *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2).

[3]Although the court of appeals analyzed the delay between 1970, when the crimes in this case were committed and the military proceedings involving respondent were held, and January 1975, when respondent was indicted, in terms of Sixth Amendment principles, we have argued in the petition that the proper inquiry is one of due process under the Fifth Amendment. Pet. 17-25. The Court's decision in *United States* v. *Lovasco*, *supra*, strongly suggests that the pre-indictment delay here did not violate the Due Process Clause. In assessing the reason for the hiatus prior to respondent's indictment, the court of appeals conceded that the case was complex (Pet. App. 21a) and that the government had not been motivated by bad faith or by a desire to hamper the defense (*id.* at 20a). The court concluded only that the delay, though largely unexplained, was due either to "indifference, negligence, or ineptitude" and that it therefore "must be weighed against the government" (*id.* at 23a). *Lovasco* establishes, however, that compelling respondent to stand trial under such circumstances would not be fundamentally unfair (slip op. 7).

reversed and remanded with instructions to dismiss that portion of respondent's appeal[4]—a course that will prevent further delay in an important first degree murder prosecution that already has been awaiting trial for more than two years. Alternatively, the Court may conclude that it is more appropriate to vacate the judgment of the court of appeals and to remand for consideration in light of the intervening decisions in *Abney* and *Lovasco*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[4]In view of its decision on the Sixth Amendment question, the court of appeals found it unnecessary to render an opinion on respondent's double jeopardy claim (Pet. App. 28a). Since *Abney* holds that the double jeopardy claim alone was appealable prior to trial, the court of appeals should address that issue on remand.

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OCTOBER TERM, 1975

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v.

JEFFREY R. MACDONALD

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1870
No. 75-1871

UNITED STATES OF AMERICA, *Appellee,*

-v-

JEFFREY R. MACDONALD, *Appellant.*

[Filed April 30, 1976]

ORDER

Upon consideration of the petitions for rehearing filed by the United States and by MacDonald, and of the suggestions for a rehearing en banc, the Court having been polled;

It is ADJUDGED and ORDERED:

1. The government's motion for modification of the record is granted.

2. The opinion of the Court is modified as follows:

a) The last sentence on page 4 of the slip opinion is revised to read as follows:

> "Never before, as we mention in Part IV, has a soldier been prosecuted by civilian authorities [etc.]."

b) On page 6, the second sentence in the paragraph beginning in the middle of the page is modified to read as follows:

> "That same day he was relieved of his medical duties [etc.]."

(c) The sentence which begins at the bottom of page 29 and runs over to the top of page 30 is deleted. The sentence beginning in the first line on page 30 is modified by substituting "The government" for "It."

3. At the request of Judge Craven, his dissent is modified as follows:

The second sentence at the top of page 46, beginning "I find . . ." is deleted. The following is substituted:

> "But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none. Id."

4. The petitions for rehearing en banc are denied.

Chief Judge Haynsworth, Judge Craven, and Judge Widener dissent from the denial of the petitions for the reasons stated in Judge Craven's dissenting opinion. Judge Widener would also grant rehearing to reconsider both the propriety and authority of this court in hearing the appeal.

The clerk is directed to notify West Publishing Company of the revisions noted in paragraphs 2 and 3.

/s/John D. Butzner
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1870
No. 75-1871

UNITED STATES OF AMERICA, *Appellee,*

v

JEFFREY R. MACDONALD, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. F. T. Dupree, Jr., District Judge.

Argued October 8, 1975. Decided January 23, 1976.

Before CRAVEN, BUTZNER, and RUSSELL, Circuit Judges.

BERNARD L. SEGAL (ORRIN LEIGH GROVER, III, MICHAEL J. MALLEY, ROBERT H. HOOD, III, KENNETH A. LETZLER, and JON VAN DYKE, on brief) for appellant; BRIAN M. MURTAGH, Attorney, United States Department of Justice (THOMAS P. MCNAMARA, United States Attorney, VICTOR C. WOERHEIDE, Attorney, United States Department of Justice, and JAMES T. STROUD, JR., Assistant United States Attorney, on brief) for appellee.

BUTZNER, Circuit Judge:

Jeffrey Robert MacDonald appeals from the denial of several motions relating to his prosecution for the

1970 deaths of his wife and two daughters.[1] We conclude that the delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May 1970 to his indictment in January 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the sixth amendment.[2] We therefore reverse and order dismissal with prejudice.

I

We stayed MacDonald's trial and allowed this interlocutory appeal pursuant to our decision in United States v. Lansdown, 460 F.2d 164, 170-71 (4th Cir. 1972).[3] There, we held that 28 U.S.C. § 1291 did not bar an interlocutory appeal in criminal cases where important rights, collateral to the main action, would be irreparably lost unless considered before trial. *But see*

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[1] The district court has jurisdiction because the crimes were committed on a military base. 18 U.S.C. §§ 7(3), 1111, and 3231.

[2] "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.

[3] In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded ". . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . ."

We also allowed MacDonald to appeal issues that would otherwise be subject to the final judgment rule, saying: "In view of our accepting the appeal of [the orders overruling the double jeopardy and speedy trial defenses], we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation." *See* part IV *infra*.

United States v. Bailey, 512 F.2d 833 (5th Cir. 1975). In *Lansdown* the appeal was from an order rejecting a plea of double jeopardy. We held that post-trial consideration of the issue could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. *See* Green v. United States, 355 U.S. 184, 187 (1957). The denial of MacDonald's plea of double jeopardy, like Lansdown's, is a proper subject for interlocutory review, but for reasons discussed in Part IV, we believe it preferable not to decide this issue. Instead, we have rested our decision on the sixth amendment's provision for a speedy trial.

Pendent to the double jeopardy claim, and closely related to it, is MacDonald's affirmative defense of denial of a speedy trial. This sixth amendment claim is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right. Braden v. Judicial Circuit Court, 410 U.S. 484, 489-90 (1973); Klopfer v. North Carolina, 386 U.S. 213, 223-25 (1967); Kane v. Virginia, 419 F.2d 1369, 1371-73 (4th Cir. 1970). Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

The hearing conducted by the Army in 1970 lasted for more than a month, and the government estimates that the trial would take six to eight weeks. The prosecution's case is wholly circumstantial and rests on a

detailed, hypothetical reconstruction of the crime. Witnesses, who have scattered across the country in the last five years, must be interviewed and assembled at great expense to both the government and the defense.

MacDonald's collateral defenses of double jeopardy and denial of a speedy trial are not fanciful. Never before, as we mention in Part IV, has a soldier been prosecuted by civilian authorities after being exonerated by his commanding officer following an Article 32 hearing; and a delay of five years between the initiation of prosecution and trial is extraordinary. Had we denied the interlocutory appeal and subsequently sustained either of MacDonald's collateral defenses, all of the burdens on the court and the parties of a prolonged, expensive trial would be for naught. These factors, which we regard as unique, were the basis for allowing this appeal.

II

In the early morning of February 17, 1970, military police received a call for help from Captain MacDonald, a physician stationed at Fort Bragg, North Carolina. Upon arriving at the family's quarters, the police found Mrs. MacDonald and the couple's two daughters clubbed and stabbed to death. MacDonald told the police that screams of his wife and six-year-old daughter awoke him from the couch in the living room. He said that during a short struggle four assailants stabbed him and knocked him unconscious. Upon regaining his senses, he attempted to revive his family and telephoned for help.

The military police, the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville,

North Carolina, police department immediately began an investigation of the crime. Examination disclosed that each member of the MacDonald family had a different blood type. The location of the victims' blood in the apartment and the presence of one daughter's blood on MacDonald's glasses cast doubt on MacDonald's account. Similarly, the presence of stray fibers from his pajama top in the master bedroom did not correspond with MacDonald's statement that it was ripped in a struggle in the living room. Torn and bloody pieces of surgical gloves, apparently of a type kept by MacDonald, were found near the victims. Although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found. From these and other circumstances, investigators theorized that MacDonald had killed his family and staged the murder scene to cover up his crime.

On April 6, 1970, the CID questioned MacDonald and informed him that he was under suspicion. That same day he was relieved of his medical duties and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Major General Edward M. Flanagan, Jr., Commanding General of the unit to which MacDonald was assigned, appointed Colonel Warren V. Rock to investigate the charges, with the assistance of a legal officer, in accordance with Article 32 of the Uniform Code of Military Justice. Colonel Rock's final report described the manner in which the Article 32 proceedings were conducted:

> "In view of the fact that both government and defense were represented by counsel, the hearing

was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose."

The government called 27 witnesses and MacDonald 29, including many character witnesses. He himself testified and was subjected to extensive cross-examination.

At the conclusion of the Article 32 proceedings, Colonel Rock filed an exhaustive report in which he recommended that "[a]ll charges and specifications against Captain Jeffrey R. MacDonald be dismissed because the matters set forth in all charges and specifications are not true. . . ." He also recommended that the civilian authorities investigate a named suspect. On review of Colonel Rock's report, General Flanagan dismissed the charges on October 23, 1970, and reported this to the Commanding General of Fort Bragg, who took no further action. Shortly afterward, the Army released MacDonald from quarters and, underscoring the finality of the military proceedings, it granted him an honorable discharge for reasons of hardship in December 1970.[4]

[4] MacDonald's discharge barred any further military proceedings against him. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

Following MacDonald's discharge, the Department of Justice asked the CID to continue its investigation. The CID complied, conducting 699 interviews. At the request of the department, it sent the weapons and the victims' clothing to the F.B.I. laboratory in July 1971 and in August furnished the Treasury Department's laboratory other items for analysis. The CID completed its field investigation in December 1971, and in June 1972 it transmitted to the Justice Department a 13-volume report recommending prosecution. A number of government attorneys studied the report and asked for further investigations. The CID filed two supplemental reports, but upon receiving a request for additional investigation, it suggested convening a grand jury before it expended any more effort. Finally, in August 1974 the government started presenting the case to a grand jury. Concurrently, the F.B.I. examined several items from the MacDonald house, and it exhumed the bodies of Mrs. MacDonald and the children to obtain hair samples.

Shortly after his discharge, MacDonald moved to California where he resumed the practice of medicine. In 1971 he was again interviewed by the CID. Beginning in January 1972 and continuing through January 1974, MacDonald, first in person and then through letters by his attorneys, requested the government to complete its investigation. He repeatedly offered to submit to an interview by the government attorneys in charge of the case.[5] The attorneys, how-

[5] For example, on March 27, 1973, MacDonald's attorney wrote an attorney in the criminal division of the Department of Justice:

"I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. Mac-

ever, declined to question him and to advise when their investigation would be completed. The correspondence appears to have come to an end in January 1974, leaving MacDonald in suspense.[6] MacDonald was subsequently subpoenaed to appear before the grand jury. He waived his right to remain silent and testified on two occasions for a total of more than five days.

The grand jury indicted MacDonald on January 24, 1975. He was promptly arrested in California and a

Donald to an in depth on-the-record interview by your office. "It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock."

[6] On January 8, 1974, MacDonald's counsel wrote:

"It is with some reservations that I wrote this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.

"I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice."

The Chief of the General Crimes Section replied on January 23, 1974:

"For your information, this case is under active investigation and will remain under consideration for the foreseeable future.

"I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice."

week later admitted to bail. He moved to have the indictment dismissed, contending that the government's delay in obtaining it denied him the right to a speedy trial. The district court denied the motion, holding that MacDonald's right to a speedy trial did not arise until the government accused him of the crime by the return of the indictment in January 1975.[7]

III

To determine whether a person charged with crime has been denied a speedy trial in violation of the sixth amendment, it is necessary to weigh the conduct of both the prosecution and the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). Recognizing that this balance compels an ad hoc appraisal of each case, *Barker* identified four factors that must be considered. They are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice

[7] In its order denying MacDonald's motion, the district court said:

"By this motion [to dismiss the indictment for denial of the right to speedy prosecution and trial] the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that 'because of government bureaucracy' the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion*, 404 U.S. 307 (1971), the motion of defendant is denied."

to the defendant." 407 U.S. at 530. We will assess each separately.

Length of delay. The critical issue concerning this aspect of the case is the identification of the event, and consequently the date, marking the beginning of the delay. The district court accepted the government's position that MacDonald's right to a speedy trial arose only after he was indicted in January 1975. MacDonald acknowledges that no significant delay has occurred since then. He contends, however, that the delay commenced when the Army formally charged him with murder on May 1, 1970, and restricted him to quarters. The length of delay, therefore, depends entirely on whether the pre-indictment delay on which MacDonald relies is of constitutional significance.

In United States v. Marion, 404 U.S. 307 (1971), the Court held that a three-year delay between the commission of a crime and indictment did not infringe the right to a speedy trial. The defendants in that case, however, were not arrested or formally accused of crime until the return of the indictment. Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay. It said:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. . . ." 404 U.S. at 320-21.

Reiterating these principles in Dillingham v. United States, 44 U.S.L.W. 3327 (U.S. December 1, 1975), the Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial. It is, therefore, essential to determine whether MacDonald's military arrest "engage[d] the particular protections of the speedy trial provision of the Sixth Amendment." *Marion*, 404 U.S. at 320.

On May 1, 1970, MacDonald's commanding officer charged under oath that MacDonald, acting with premeditation, murdered his wife and two daughters. Simultaneously, the commanding officer recommended trial by general court-marital.[8] The charge was the

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[8] U.C.M.J. Art. 30, 10 U.S.C. § 830, provides:

> "(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
>
> (1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
>
> (2) that they are true in fact to the best of his knowledge and belief.
>
> "(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

functional equivalent of a civilian arrest warrant, for under U.C.M.J. Article 10, 10 U.S.C. § 810, it subjected MacDonald to arrest or confinement.[9] Like its civilian equivalent, military arrest must be based on probable cause.[10] The status of an officer restricted to quarters under arrest differs from that of one who is simply restricted to quarters in lieu of arrest. The distinction depends on whether the accused is relieved of his military duties. He is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not.[11] Because MacDonald was relieved of his

[9] U.C.M.J. Art. 10, 10 U.S.C. § 810, provides:

"Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

[10] U.C.M.J. Art. 9, 10 U.S.C. § 809, provides:

"(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

. . . .

"(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

"(d) No person may be ordered into arrest or confinement except for probable cause."

[11] *See* ¶ 20*a and b*, Manual for Courts-Martial (U.S. 1969 rev. ed.).

duties, he was restricted to quarters under arrest.

As the government's counsel acknowledged at oral argument, had MacDonald been an enlisted man, he probably would have been confined in a stockade. While his restriction to the bachelor officers' quarters was undoubtedly more comfortable and less confining than imprisonment in a guard house, it was nevertheless a public act that seriously interfered with his liberty. He was relieved of his duties, his phone calls were logged by a military policeman, and he was placed under the surveillance of an escort officer whenever he left his quarters.

The government relies on Wales v. Whitney, 114 U.S. 564 (1885), to support its argument that MacDonald's status was not analogous to that of a civilian who has been arrested. In *Wales,* the Medical Director of the Navy, who had been placed under arrest and restricted to the city of Washington, D.C., pending court-martial, sought a writ of habeas corpus to test the jurisdiction of the military court. The Supreme Court, noting that Washington was his place of duty, observed that "[i]t is not easy to see how he is under any restraint of his personal liberty, by the order of arrest, which he was not under before." The Court held that the physical restraint of the Medical Director was insufficient as a matter of fact, and the moral restraint imposed by the order was insufficient as a matter of law, to justify issuance of the writ. In reaching this conclusion, the Court pointed out that other procedures allowed the Medical Director to challenge the military court's jurisdiction, and consequently the denial of his petition did not deprive him of an adequate remedy.

We find the government's attempt to equate MacDonald's situation to Wales' unpersuasive. MacDonald's arrest is distinguished from Wales' by the greater limitations placed on his liberty. Apart from this, "[n]otions of custody have changed" since 1885, Strait v. Laird, 406 U.S. 341, 351 (1972) (Rehnquist, J., dissenting), and *Wales'* custody requirement for a writ of habeas corpus "may no longer be deemed controlling." Hensley v. Municipal Court, 411 U. S. 345, 350 n. 8 (1973).

In any event, the standard employed by the Court in *Wales* to evaluate a restraint of liberty for the procedural requirements of habeas corpus provides an unsatisfactory measure to test the denial of the sixth amendment's guarantee to a speedy trial. The appropriate test is found in *Marion*, not *Wales*. MacDonald was subjected to "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. at 307.[12] It is these circumstances, as the Court points out, "that engage the speedy trial provisions of the Sixth Amendment." Marion, 404 U.S. at 307. We conclude, therefore, that MacDonald's military arrest was the functional equivalent of a civilian arrest

[12] The Assistant United States Attorney for the Eastern District of North Carolina, appearing for the government in the bail hearing before a magistrate for the United States District Court for the Central District of California, described MacDonald's status as follows:

> "Back in the Article 32 hearing, he was in custody. He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service."

allowing him to invoke the sixth amendment's guarantee of a speedy trial.

For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him.[13] The prosecution of the same charge—murder—that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution.

MacDonald's freedom from detention or bail during the interval between the termination of the Article 32 proceedings and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.[14] He remained under suspicion and was subjected to the anxiety of the threat of another prosecution.

[13] We agree with the government that Fed. R. Crim. P. 48(b) did not control the military proceedings against MacDonald and thus was not applicable to him until his arrest by civilian authorities, *cf.* Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968).

[14] MacDonald alleges that his legal expenses for contesting the Army proceedings against him and for retaining counsel since then amount to $50,000. He estimates that expenses of trial would amount to an additional $250,000.

The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial.[15] In Klopfer v. North Carolina, 386 U.S. 213 (1967), the Court held that the practice of nolle prossing an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. *Klopfer* differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly—Klopfer's by retrial and MacDonald's by court-martial

[15] Although the government acknowledges that the Speedy Trial Act of 1974 does not govern this case, it contends that the principles codified in 18 U.S.C. § 3161(h)(6) and its prototype, ABA, *Standards Relating to Speedy Trial* § 2.3(f) (App. draft 1968), should be applied to toll the running of time during the interval from the dismissal of the Army's charges against MacDonald in October 1970 to the return of the indictment in 1975. However, the tolling provision of § 3161(h)(6) must be read in conjunction with the entire Act, which sets fixed time limits after arrest, subject to certain exclusions, within which trial must take place. A single section of the Act should not be used outside of its statutory context as a standard for interpreting the sixth amendment, because the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause. In contrast, Barker v. Wingo, 407 U.S. 514 (1972), which eschews rigid time limits, provides the analysis which we must follow in determining whether the sixth amendment's guarantee has been violated.

if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury.[16] Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

Speaking of the purposes of the sixth amendment's speedy trial provision, the Court said in United States v. Marion, 404 U.S. 307, 320 (1971):

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety

[16] U.C.M.J. Arts. 18, 32-34, 10 U.S.C. §§ 818, 832-34; ¶¶ 34 and 35 Manual for Courts-Martial (U.S. 1969 rev. ed.); 18 U.S.C. §§ 1111 and 3231.

> in him, his family and his friends. These considerations were substantial underpinnings for the decision in Klopfer v. North Carolina. . . ."

The considerations which the Court recognized as "substantial underpinnings" for affording Klopfer the protection of the sixth amendment apply also, we believe, to MacDonald, whose situation, viewed realistically, was similar to Klopfer's.

The delay between the accusation and detention of MacDonald and his indictment was more than four and one-half years. The Court described a five-year delay as "extraordinary" in *Barker,* 407 U.S. at 533, and in United States v. Macino, 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment was considered excessive. We conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing MacDonald's claim that he has been denied a speedy trial. *Barker,* 407 U.S. at 530.

The reason for the delay. Barker teaches that the weight to be given delay varies with the government's reasons. Deliberate delay to hamper the defense must be weighed heavily against the government, and valid reasons such as a missing witness serve to excuse the delay. Neither of these extremes applies to MacDonald's case, which appears to fall in a middle ground. Speaking of this, the Court said that a "neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531.

There are several identifiable phases of delay and the reasons for them differ. During the initial period, the 1970 Army investigation and Article 32 proceeding, MacDonald was being prosecuted, so the inaction of civilian authorities was justified. For the next 18 months, at the request of the Department of Justice, the CID conducted another extensive investigation. Since the charges had been previously dismissed for insufficient evidence, the civilian prosecutors understandably desired a new investigation before bringing MacDonald to trial. The investigators were not dilatory and the case is complex, so this delay should not be weighed heavily against the government. *See Barker,* 407 U.S. at 531.

The CID's report, along with its recommendation to prosecute, was transmitted to the Department of Justice in June 1972, more than two years before the commencement of grand jury proceedings. The government has not provided any satisfactory explanation for this two-years hiatus. It suggests that the need for further investigation and for its attorneys to become familiar with the case justifies the delay. But no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. There is no indication in the record that the delay during this period was "inevitable" because of "[c]rowded dockets, the lack of judges or lawyers," or any other factor which might mitigate the government's failure to bring

MacDonald to trial promptly after the CID completed its report in June 1972. *See* Dickey v. Florida, 398 U.S. 30, 38 (1970). The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily for the government's convenience.[17] The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy." [18] Whether one attributes the delay from

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[17] The government may have proceeded on the erroneous assumption that no matter how much time elapsed between prosecutions, the pre-indictment delay would be of no consequence. But a mistake of law affords no justification for depriving an accused of sixth amendment rights. Dickey v. Florida, 398 U.S. 30 (1970).

[18] During the course of the government's summation at the bail hearing, the Assistant United States Attorney and the Magistrate engaged in the following colloquy:

> ASSISTANT UNITED STATES ATTORNEY: Your Honor, there is, I am sure, some question about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.
>
> At the time of the Article 32 hearing in 1970 when Dr. MacDonald was released from the Army charges, much of the scientific evidence that I've made available to you today was not available to the hearing officer at that time.
>
> THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

mid-1972, when the CID recommended prosecution, until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. *Barker,* 407 U.S. at 514; Dickey v. Florida, 398 U.S. 30 (1970). We turn, therefore, to the third factor prescribed by *Barker,* an appraisal of MacDonald's conduct.

The defendant's assertion of his right. In *Barker* the Supreme Court observed that some defendants may wish to delay trial in expectation of the prosecution's case becoming stale. 407 U.S. at 521. At the same time, it rejected a strict "demand-waiver" approach that requires a defendant to assert the right or lose it. 407 U.S. at 524-29. It recognized, however, that an important factor in deciding a claim that a defendant has been denied a speedy trial is whether he wanted

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> ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.
>
> THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?
>
> ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence was in existence the whole time: The bloody sheet, the bath mat and the—
>
> THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?
>
> ASSISTANT UNITED STATES ATTORNEY: That's correct.
>
> THE MAGISTRATE: Very well.
>
> ASSISTANT UNITED STATES ATTORNEY: We were not—Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.
>
> Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

one and made his demands known to the prosecution. 407 U.S. at 531-32.

MacDonald has by no means delayed the prosecution of his case. While he was in the Army, and afterwards, he gave statements to the CID. He testified under cross-examination in the Article 32 hearing and offered to submit himself to questioning by attorneys in the Department of Justice. Additionally, he waived immunity and testified before the grand jury.

MacDonald also has consistently expressed a desire to have the case resolved. He first attempted to expedite a decision in January 1972. Later, his attorneys wrote the department several letters inquiring about a final decision on the prosecution to relieve "the unfounded suspicion" to which MacDonald was subjected.[19] A person in his position who has been arrested but not indicted is under no compulsion to demand prosecution in order to perserve (*sic*) his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. United States v. Macino, 486 F.2d 750 (7th Cir. 1973); *cf. Barker,* 407 U.S. at 529. Both the facts and the law, therefore, warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial. In accordance with *Barker,* his assertion "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." 407 U.S. at 531-32.

Prejudice to the defendant. An affirmative demonstration of prejudice is unnecessary to prove a denial of the right to a speedy trial. It is, however, one of the

[19] Extracts from some of the letters are quoted in notes 5 and 6 *supra.*

factors a court must weigh in adjudicating the accused's claim. Moore v. Arizona, 414 U.S. 25 (1973); *Barker,* 407 U.S. at 533. The Court has said the sixth amendment's guarantee of a speedy trial is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120 (1966). Prejudice, therefore, should be assessed in the light of these interests. *Barker,* 407 U.S. at 532.

MacDonald was not imprisoned or subjected to bail from October 1970 until January 1975, but his freedom to come and go is not decisive. An accused person who is not restrained may nonetheless be prejudiced. Klopfer v. North Carolina, 386 U.S. 213, 221 (1967). MacDonald has had to live with the constant threat of a new prosecution. He has been required to retain counsel at his own expense, and he has suffered anxiety concerning the unresolved nature of the case. These personal concerns are significant elements of prejudice. United States v. Marion, 404 U.S. 307, 320 (1971).

Also, MacDonald's claim that his ability to defend himself has been impaired is not unfounded. Most of his witnesses who were in the Army in 1970 have scattered across the country. Even if the government provides the defense with current addresses, interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive. Moreover, in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details.

Such potential memory loss is critical in this case, since a detailed reconstruction of the murder scene is an element of the government's case. The position of a flowerpot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on. In one instance, the government contended at the Article 32 hearing that an overturned coffee table lying on its side showed that the murder scene was staged, since the table was top-heavy and would have turned completely over if kicked in a scuffle. When the Article 32 officer visited the scene and kicked the table over, however, it struck a chair and landed on its side. Thus, the exact position of the chair is important in determining whether MacDonald staged the murders as the government charges.

The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have been kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witnesses's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked.

In sum, applying the principles of United States v. Marion, 404 U.S. 307, 320-21 (1971), we conclude that for the purposes of determining whether MacDonald was denied his right to a speedy trial, the Army's

formal accusation and detention on May 1, 1970, entitled him to invoke the protection of the sixth amendment. *See* Dillingham v. United States, 44 U.S.L.W. 3327 (U.S. Dec. 1, 1975). Weighing the factors specified by Barker v. Wingo, 407 U.S. 514 (1972), we believe that the delay—even if the period from May 1, 1970, to June 30, 1972, is wholly excluded as excusable—was of sufficient length to be "presumptively prejudicial." 407 U.S. at 530. The delay, therefore, necessitates inquiry into the other factors of the balance. The government has furnished no satisfactory explanation for the delay from the end of June 1972 until the grand jury was convened in August 1974, so this time must be weighed against it. MacDonald, on the other hand, neither contributed to this delay nor acquiesced in it, so his conduct weighs heavily in his favor. Finally, it is apparent from the record that MacDonald has been prejudiced by the formal accusation and arrest of May 1970, by anxiety arising out of the delayed resolution of this charge, and by the impediment to his defense that scattered witnesses and dimmed memories inevitably cause. Weighing all of these factors, we conclude that the government has denied MacDonald a speedy trial as guaranteed by the sixth amendment and that the prosecution must be dismissed. Strunk v. United States, 412 U.S. 434 (1973).

IV

We find no error in the district court's rulings concerning the composition of the grand jury, alleged prosecutorial misconduct, and the denial of motions for discovery and suppression of evidence.

MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court-martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the sixth amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law.

The case is remanded with directions to dismiss the prosecution with prejudice because of the government's failure to accord MacDonald a speedy trial as required by the sixth amendment.

CRAVEN, Circuit Judge, dissenting:

My brothers hold that the sixth amendment compels the dismissal of the *only* prosecution ever begun against Dr. MacDonald. One need know very little about military law to understand that a charge of homicide can be disposed of finally only by court-martial. None was ever convened. Instead, the Army, pursuant to Article 32, Uniform Code of Military Justice,[1] simply conducted a "thorough and impartial investigation" to determine whether the charge might be referred to a general court-martial, and concluded that the evidence was insufficient to justify the convening of a general court. It is true that the hearing was protracted and made newspaper headlines. But it is also true, it seems to me (my brothers do not reach the question), that Captain MacDonald has never been put to trial by either a civil or military court. What happened to him in the Army is the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill, and that is all.[2]

[1] 10 U.S.C. § 832.

[2] My brothers premise their analysis on an application of a civilian court of the sixth amendment speedy trial guarantee to events which occurred while MacDonald was in the military.

That the sixth amendment's speedy trial guarantee applies to the military is an appealing assumption but should be recognized as such. The criminal trial provisions of both the fifth and sixth amendments are clearly aimed at procedure in the civil courts. The fifth expressly excludes cases arising in the land or naval forces from prosecutions requiring grand jury indictment, and it is settled that neither the fifth or sixth amendments can "be taken to have extended the right to demand a jury to trials by military commission. . . ." Ex Parte Quirin, 317 U.S. 1, 40 (1942). It is true that the Supreme Court once assumed the application of the double jeopardy clause of the fifth amendment in a military context, but in doing so it is significant that it denied relief. Wade v. Hunter, 336 U.S. 684 (1949). I think my brothers' decision would rest on firmer ground if it were pitched on the fundamental fair-

My brothers hold that the sixth amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court in *Marion*,[3] *Baker*,[4] and *Dillingham*,[5] is triggered by the Army proceedings. I think not and respectfully dissent.

I.

In *Marion* the Supreme Court defined the point at which the sixth amendment becomes applicable:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "*accused*" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

404 U.S. at 313 (emphasis added).

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ness doctrine implicit in the due process clause, which has been applied time and again to an infinite variety of matters not restricted to criminal procedure in the civilian courts, as is, I think, the sixth amendment right to speedy trial. *See generally* O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969); Kinsella v. Krueger, 351 U.S. 470, 474 (1956); Duncan v. Kahanamoka, 327 U.S. 304, 309 (1946); Burns v. Lovett, 202 F.2d 335, 341-42 (D.C. Cir. 1952), *aff'd sub nom.*, Burns v. Wilson, 346 U.S. 137 (1953).

[3] United States v. Marion, 404 U.S. 307 (1971).

[4] Barker v. Wingo, 407 U.S. 514 (1972).

[5] Dillingham v. United States, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

It is now settled that a civilian becomes an "accused" when he is arrested and charged with a crime. This is so, the Supreme Court tells us, because:

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Marion, supra at 320. *See Dillingham v. United States*, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975) (quoting *Marion*).

Thus, "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Dillingham, supra; Marion, supra.*

It is significant to me that the Court equates "either a formal indictment . . . or else the actual restraints imposed by arrest . . . to answer a criminal charge. . . ." It does *not* suggest that the amendment is triggered when the prosecutor presents the bill to the grand jury. Instead, the period of time for measuring the speed of the trial runs from the return of a true bill into the court. Charge is not enough. At most, Dr. MacDonald was "charged." Also, under the specific language of *Marion*, I do not believe the sixth amendment's speedy trial guarantee would be brought into

play by an arrest without warrant by a federal drug enforcement officer, for example, if, upon presentation to a magistrate, the arrestee were released because no probable cause was shown. I do not believe my brothers would contend otherwise.[6]

My analysis of the facts of this case is that the procedure in which MacDonald was involved falls somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest. Neither, I believe, warrants an application of the sixth amendment's speedy trial guarantee.[7]

MacDonald was charged with the murder of his wife and children by Colonel Francis Kane, his immediate commander. These charges were preferred under Article 30, U.C.M.J.[8] That article makes clear that a finding of "probable cause" is not required to "charge" an individual under the Code.[9] Indeed, anyone subject

[6] I note that Dillingham was arrested on a warrant. United States v. Palmer, 502 F.2d 1233, 1234 (5th Cir. 1974), *rev'd sub nom.*, Dillingham v. United States, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

[7] This case differs from both my examples in that during these proceedings MacDonald was neither as free from restraints as a person under grand jury investigation nor as restricted as someone under civilian arrest. *See* part II, *infra*.

[8] 10 U.S.C. § 830.

[9] Article 30 reads as follows:

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

to the U.C.M.J. can prefer charges against anyone else who is also under the Code.[10] A determination of probable cause, or its "functional equivalent," is only made under military procedure at the Article 32 proceedings.[11]

In MacDonald's case, at the close of the Article 32 proceedings Major General Edward M. Flanagan, Jr., acting on the report of Colonel Warren V. Rock, who presided at those proceedings, dismissed the charges because "[i]n [his] opinion, there [was] insufficient evidence available to justify reference of the charges to trial by court-martial."

It is therefore clear that no finding of probable cause was made in Dr. MacDonald's case at the Article 32 proceedings. My brothers are of the view, however, that we should presume such a finding was made because it should have been made prior to "arrest" under 10 U.S.C. § 810.

Whether a finding of probable cause was made is a

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

[10] ¶ 29b, Manual for Courts-Martial (U.S. 1969 rev. ed.).

[11] Article 32, 10 U.S.C. § 832 reads in relevant part:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

question of fact. If there were such a finding I should think it would be supported by the record, but the majority makes no reference to any orders, either written or oral, to indicate that a finding of probable cause was made. We are not told when the finding was made, who made it, or what procedures he followed in doing so. Instead, as I have said, a presumption is created.

First, my brothers reason that since MacDonald was relieved of his duties, his status must be that of "arrest" rather than "restriction to quarters in lieu of arrest." Secondly, they correctly note that under 10 U.S.C. § 810 MacDonald was subject to arrest or confinement when charged with the murder by Colonel Kane on May 1. And finally, they infer that since 10 U.S.C. § 809 purports to require that all arrests be supported by probable cause that probable cause must have been found in MacDonald's case.

I do not believe it is necessarily the case that because MacDonald was relieved of his duties, he was arrested. I read Paragraphs 20a and b of the Manual for Courts-Martial only to say that an officer under "arrest" may not be required to perform his duties and that an officer restricted to quarters in lieu of arrest may be required to do so. These two provisions do not forbid the Army from relieving one restricted to his quarters of any or all of his duties. That MacDonald was relieved of all duties is not, I believe, conclusive as to his status.

I agree with my brothers, as I have previously said, that MacDonald was subject to arrest or confinement under 10 U.S.C. § 810 when charged with homicide. But I cannot agree that the power to do a thing requires a

finding that it was done. Whatever the logic of such a presumption, I believe Paragraph 18b of the Manual of Courts-Martial destroys it for that paragraph explicitly states that the arrest and confinement provisions, although couched in terms of requirements, are "not mandatory and [their] exercise rests within the discretion of the person vested with the power to arrest or confine." [12]

I think the Manual of Courts-Martial will take us just so far and that we are driven back to the facts, and the facts are that Dr. MacDonald was verbally restricted to quarters by Colonel Kane on April 6, 1970, and there is nothing whatsoever in the record to suggest any change in his status when he was formally charged on May 1. If MacDonald was ever arrested it must have been on April 6 when he was first restricted to quarters and his duties lifted, and on that date I do not believe that anyone suggests the existence of probable cause for arrest, let alone a specific finding to that effect.[13]

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[12] b. Basic considerations. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

[13] All the majority tells us about that event is that on April 6 the CID informed MacDonald that "he was under suspicion." Slip Opinion at [7a]. I find nothing in their treatment of this encounter nor anything in the record to indicate that on that day probable cause was found.

My brothers and I agree, I think, that arrest without more is not enough to trigger the sixth amendment. There must be a lawful arrest, *i.e.*, with probable cause. It is fair to say, I think, that there is not one word in the record to even suggest that anyone, must less the equivalent of an impartial magistrate, ever purported to find probable cause to arrest Dr. MacDonald. I believe we can be fairly sure that this is the first instance in the long history of the doctrine of probable cause in which a court has assumed that there must have been such a finding because it should have been made.

Finally, I cannot agree with my brothers that Colonel Kane's charge was the functional equivalent of a civilian arrest warrant. I am not sure to what it should be equated, but it is equally plausible to view it as the functional equivalent of the complaint of the prosecutor who then must seek an arrest warrant from an impartial magistrate.

Based on the above analysis I believe it is clear that a finding of probable cause was *never* made in Dr. MacDonald's case. Unless we ignore as surplusage the Supreme Court's language in *Marion,* which it repeated in *Dillingham,* that to "arrest and detain, the government must assert probable cause to believe the arrestee has committed a crime," I do not understand how this case can be fitted within the rule of law established by those cases. Furthermore, I do not believe that the policy underpinnings of *Marion* allow us to ignore the significance of a finding of probable cause. The Supreme Court concentrated on the impact of the public act of arrest on the defendant. I believe that fundamental to that impact is the fact that, in the civilian arrest context with which *Marion* was con-

cerned, an arrest must be supported by probable cause. With reference to public obloquy, contrast instead, what happened to Dr. MacDonald: after the equivalent of the return of "not a true bill," he was honorably discharged. I, therefore, think that Dr. MacDonald's case is clearly distinguishable from any of the cases cited by the majority.

My brothers find this case to closely parallel *Klopfer v. North Carolina,* 386 U.S. 213 (1967), differing from it in only one respect: "there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period."[14] I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case that Klopfer's sixth amendment rights had been violated.

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the *"anxiety and concern accompanying public accusation,"* the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denied the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

386 U.S. at 222 (footnote omitted and emphasis added).

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[14] Slip Opinion at [18a].

During this four-year period MacDonald stood under no "public accusation." The charges had been dismissed by the Army, and this action was made irrevocable by his discharge from the Army. I find this claim therefore to be one of double jeopardy, which I do not believe is meritorious, and which issue my brothers do not reach.

II.

Under my brothers' reasoning, we must determine that military arrest is the functional equivalent of civilian arrest for the purpose of triggering the right to a speedy trial. I conclude that MacDonald was never "arrested" in the sense required under *Marion*.

MacDonald was restricted to his room in the Bachelor Officers' Quarters.[15] An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters.[16] While *Wales v. Whitney*, 114 U.S. 564

[15] The majority opinion attaches significance to the fact that had MacDonald been an enlisted man he would have probably been confined in the stockade. Slip Opinion at [15a]. The fact is that he was an officer and was not so confined.

[16] The government describes MacDonald's restrictions as follows:

> He was to remain in his room except when he was visiting his lawyers, dining at the officers club, or making parachute jumps for pay qualification purposes. The general, though unenforced, limitation on Captain MacDonald's movement was the requirement that he be accompanied by an escort officer while on post. He was permitted to sun bathe in the vicinity of the BOQ, to play golf on post, to attend the post chapel as well as the post theatre, post liquor (Class VI) store, commissary, post exchange and the bowling alley.

Brief for Appellee at 5-6.

In the context of the military where a person is subject normally

(1885) is, as my brothers say, no longer the law as to the degree of "confinement" necessary to support issuance of a writ of habeas corpus, I believe it is fully applicable to the majority's search for the functional equivalent of a civilian arrest. In that respect, I believe it is still sound precedent and demands a conclusion that MacDonald was not in a civilian sense under the "actual restraints required by arrest and holding to answer to a criminal charge."

In *Wales* a Navy officer who had been ordered to appear for trial at general court-martial was given the following order by the Secretary of the Navy: "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington." 114 U.S. at 566. While the majority may be correct that the cases differ with respect to "the greater limitations placed on [MacDonald's] liberty,"[17] I believe, like those in *Wales*, the restraints imposed on MacDonald did not constitute "actual confinement or the present means of enforcing it." 114 U.S. at 572. The restraints were, under the Supreme Court's terminology, simply "moral." As I read *Wales*, the critical point was not that the petitioner in that case was free to walk the streets of Washington, D. C., alone. The Supreme Court focused on the fact that if he had wished to leave the District, he was free to do so, "[a]nd though it is said that a file of marines or some proper officer could

to the orders of his superiors, I do not find this the type of serious "interfere[nce] with his liberty" which I believe brings the right to speedy trial into play.

[17] Slip Opinion at [16a].

have been sent to arrest and bring him back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another distinct order." 114 U.S. at 572.

Neither side has provided this court with the orders directed to MacDonald or others concerning his restriction to quarters. At oral argument, however, we were told by the government attorney arguing the case that the MP stationed outside MacDonald's door was given specific instruction *NOT* to stop him if he tried to leave. The escort officer who accompanied MacDonald, according to my understanding of the facts, was not armed. I find nothing in the record to indicate that his orders included a direction to stop MacDonald from any conduct he undertook. I therefore find the present case indistinguishable from *Wales*. Any actual confinement would have required an additional order, and there was therefore no "actual confinement or the present means of enforcing it." *Wales, supra* at 572.

III.

Having concluded that the sixth amendment's guarantee of speedy trial does not apply in MacDonald's case, he may still prevail if it were found that the delay violated his right to due process under the fifth amendment. *See, e.g., Marion, supra* at 324; *Ross v. United States,* 349 F.2d 210 (D.C. Cir. 1965). But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none.

The majority finds prejudice in the fact that MacDonald's witnesses, as Army personnel, have scattered around the world with resulting difficulty in locating

them and conducting pretrial interviews. In addition, my brothers agree with MacDonald's argument that the memories of these witnesses will be dulled by time. But all that is speculative. In a wholly circumstantial type of case, it is improbable that guilt or innocence will turn upon accurate recollection of the facts. It is not suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew.

But if it be assumed that these factors may supply the requisite prejudice under the sixth amendment's more specific guarantees, I do not believe they require dismissal of the indictment under the fifth amendment's guarantee of due process. Certainly that question need not be anticipated, and could best be left for determination at trial.

I would affirm.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1870
No. 75-1871

UNITED STATES OF AMERICA, *Appellee,*

versus

JEFFREY R. MACDONALD, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville.

STAY ORDER AND ORDER ALLOWING APPEAL.

This is an attempt to appeal from an order entered by the district court overruling the appellant's contentions that he would be subjected to double jeopardy and denied a speedy trial if brought to trial in the United States District Court.

The contentions arise because of certain proceedings conducted by the military some five years ago. Because of the time equation (trial is now set in the district court to begin August 18, 1975), it has not been possible for counsel to brief these questions nor is it possible for the court to hear argument.

We are of the view that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been

irreparably lost. *United States v. Lansdowne* 460 F.2d 164 (1972).

For these reasons we allow the appeals and direct the district court to stay further proceedings in the trial of the case until the appeals are determined.

In view of our accepting the appeal of these issues, we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation.

The clerk will immediately notify the district court and counsel of the entry of this order.

Done by the clerk by direction of Judges Craven, Butzner, and Russell this fifteenth day of August, 1975.

/s/William K. Slate, II
Clerk.

[Filed August 15, 1975]
William K. Slate, II, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA, *Plaintiff.* vs. JEFFREY R. MACDONALD, *Defendant*	No. 75-26-CR-3 ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS

[Filed July 29, 1975]

The defendant who stands indicted on three counts of first-degree murder has filed ten pre-trial motions which have been extensively briefed and argued by defendant's counsel and counsel for the government over a period of almost four months. Two of the motions on which defendant seemed to place greatest reliance have been the subject of separate lengthy orders by the court. This order will contain the court's rulings on the remaining pre-trial motions of the defendant.

MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY

By this motion the defendant seeks transcripts of his own grand jury testimony, the testimony of all expert witnesses before the grand jury and the testimony of all other witnesses before the grand jury. The government has heretofore furnished the defendant a transcript of his own grand jury testimony, and that phase of the motion is now moot. The court having thoroughly considered defendant's motion, the briefs and argu-

ment of counsel and the results of the court's own research, is of opinion that the motion ought to be and is hereby denied in the discretion of the court and on authority of *United States v. Andeson* (*sic*), 481 F.2d 685 (4th Cir. 1973).

MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 16 AS AMENDED

By this motion the defendant seeks in effect to obtain a copy of the government's entire file including photographs, all tangible evidence and exhibits of every kind and description. In response to the motion the government has agreed to make available to the defendant in advance of the trial or at the trial pursuant to the provisions of the Jencks Act, 18 U.S.C. § 3500, certain portions of the evidence sought to be discovered by the motion. Except as thus agreed by the government, the court is of opinion that the motion is overly broad and should be and is hereby denied in the discretion of the court. *United States v. Anderson,* 481 F.2d 685 (4th Cir. 1973). The court reserves the right to modify this ruling should it appear later in the proceedings that the ends of justice require such action.

MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY

In this motion defendant alleges that the appearance before the grand jury of Victor J. Woerheide, Esq., an

attorney for the Department of Justice, was unlawful and in violation of the provisions of 28 U.S.C. § 515(a), F.R.Crim.P., Rule 6(d), and the rights of the defendant under the Fourth, Fifth and Sixth Amendments of the Constitution. The court finds that Mr. Woerheide's appearance before the grand jury was duly and lawfully commissioned by the Attorney General of the United States, and the motion as based on this ground is denied on authority of *United States v. Weiner,* 392 F.Supp. 81 (N.D.Ill. 1975). *See also In re Persico,* 44 L.W. 2011 (2nd Cir., June 19, 1975).

From the evidence offered the court finds no improper conduct on the part of the government attorneys during the questioning of defendant before the grand jury and the motion as based on this ground is denied.

The defendant has not offered evidence to sustain his allegation that the grand jury received and considered the testimony of improper witnesses, and the motion as based on this ground is denied.

From the evidence offered the court finds that the attorneys for the government did not intentionally and falsely misstate the scope and objectives of the grand jury investigation in order to unlawfully induce the testimony of the defendant and other persons, and the motion as based on this ground is denied.

MOTION TO DISMISS INDICTMENT BECAUSE OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

In this motion defendant alleges that pursuant to Article 32 of the Uniform Code of Military Justice a duly-appointed military officer conducted "judicial

proceedings" during the months of June through September of 1970 including four full weeks of testimony during which time the government presented all of the evidence known to it bearing on the crimes in question; that at the conclusion of those proceedings the charges against the defendant, Jeffrey R. MacDonald, were dismissed as being without foundation; and that in October, 1970, the Commanding General charged with the final authority in the matter "entered an order dismissing finally and with prejudice the charges against the defendant." On the basis of these proceedings defendant contends that the January 1975 grand jury indictment is violative of his double jeopardy and due process of law rights under the Fifth Amendment and that "re-charging of the defendant under the circumstances described above is barred by the doctrine of collateral estoppel." In their briefs the parties have cited no case determining the exact question thus raised nor has the court's own research revealed a case directly in point. The recent case of *Breed v. Jones,* — U.S. —, 95 S.Ct. 1779, 43 L.W. 4644 (May 27, 1975), cited and relied upon by defendant, is clearly distinguishable. This court is of opinion that jeopardy did not attach by reason of the Article 32 investigation proceedings conducted by the military and that the government is not collaterally estopped by reason of those proceedings. It is not perceived how the due process rights of the defendant have been prejudiced by the proceedings, and defendant's motion must therefore be and is hereby denied.

MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE AND TO DISMISS THE INDICTMENT

In this motion the defendant alleges that during the course of the Article 32 proceedings at Fort Bragg in 1970 while he was under house arrest and confined to his quarters at Fort Bragg government agents "repeatedly and unlawfully entered the defendant's rooms, conducted general searches, and examined, read and copied papers, documents and materials pertaining to the defense of the defendant" and that during that time and thereafter illegal wiretaps were placed upon telephones used by the defendant. The government has categorically denied all such allegations under oath. Even if defendant's allegations and his evidence in support thereof are accepted as true, he is unable to point to any information or evidence gained by the government as a result of such alleged unlawful activity, and defendant's motion is therefore denied. This ruling is made without prejudice to defendant's rights to renew his motion with respect to any illegally-obtained evidence which the government may seek to introduce upon the trial of the case.

MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(e)

By this motion defendant seeks to suppress as evidence against him "all items seized and the fruits thereof of searches and seizures from the graves of Colette and Kimberley MacDonald" following the exhumation of the bodies of these two murder victims by agents of the government in August or September, 1974. Upon consideration of the evidence bearing on the question raised by this motion and the briefs and argument of counsel the court is of opinion that the graves of Colette and Kimberley MacDonald were lawfully opened at the instance of the government; that the defendant does not have standing to contest the opening of the graves; and that they were not opened in violation of the applicable statutes of New York, the state in which the exhumations occurred. The defendant's motion is therefore denied.

MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

By this motion the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that "because of government bureaucracy" the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been "accused" of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion*, 404 U.S. 307 (1971), the motion of defendant is denied.

In connection with this motion the defendant also

moved to depose certain officials of the department of Justice, but since that time the court is informed that the defendant has filed an action under the Freedom of Information Act in the District of Columbia for the purpose of obtaining further evidence, and defendant's motion for leave to conduct further discovery in this action is denied.

F. T. DUPREE, JR.
United States District Judge

July 28, 1975.

☆ U.S. Government Printing Office: 1976—208-453/262

Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1976
CERTIORARI GRANTED JUNE 20, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS

1/24/75 Fil, & ent, INDICTMENT; Orig.

1/27/75 Fil, & ent, ORDER: To open Indictment upon filing of this Order. J Dupree Cr OB #11 Page 200

1/24/75 ISSUED—WARRANT FOR ARREST OF DEFT. issued Jan 24, 1975

2/12/75 Fil, & ent, U.S. Marashal's return serv. Jeffrey R. MacDonald 1/28/75 USDM.,

2/24/75 Received from the Central District of California Trust Deeds Nos. 3347, 3334, and 3335 secured in that District. Deeds pertain to a follow-up replacement bond which to date has not been made as such Deeds only justify about half the required amount of the bond. No. 3347—John R. & Bernadette R. Page in the amount of $16,000.00; No. 3334—Paul and Eva Hildebrand $25,000; No. 3335 Gordon, Fields & Boland in the amount of $15,000.00. Forwarded to Raleigh under Certificate No. 147895 to be placed in case file, with copy of docket.

2/27/75 Fil, & ent, NOTICE OF MOTION: Orig and c.c. & MOTION TO TRANSER by

2/27/75 Fil, & ent, MOTION FOR LEAVE TO EXCUSED FROM COMPLIANCE WITH, DISTRICT COURT RULE 1(e) and notice of Motion: Orig Hd and c.c.

Fil, & ent, ORDER: deft, shall comply w/local rule 1(E) by associating counsel who is a member of the bar of this court and who resides in and maintains and office in the State of North Carolina on or before April 7, 1975. (J Dupree) Cr OB #11 p. 229

3/10/75 Fil, & ent, WAIVER OF ARRAIGNMENT: Orig and c.c. c.c. to J Butler 2 c.c. to USA.

DATE	PROCEEDINGS

Fil, & ent, STIPULATION: Orig and c.c. c.c. to J Butler, all pre-trial motions shall be filed before April 7, 1975 and pre-trial briefs not later than 20 days after April 7, 1975. Arraignment in this case shall be postponed until after all of the motions and responses have been filed. Arrainment is postponed until May 5, 1975. J Dupree, to be heard at Raleigh, NC.

4/7/75 Fil, & ent, Trust Deed in the amount of $1700.00, Stephen R. Shea 4242 Calhoun, Huntington Beach Calif. Recorded in Orange Co. Calif.

Fil, & ent, The Original Appearance bonds in amounts of $32,000.00, $28,000.00 and $40,000.00 posted by deft, to appear in this district EDNC, and have replaced the original cash bond (minute order see below

Fil, & ent, Minute order in Chambers, Appearance Bonds dated 3/1/75 amounting to $100,000.00 in the above matter replace the original Cash bond of 1/31/75, and that the original Cash Bond is exonotated signed John R. Kronenberg, U.S. Magistrate, CD of Calif.

Fil, & ent, MOTION FOR EXTENSION OF TIME: Orig and c.c.

Fil. & Ent. ORDER extending time within which the United States may respond to the M/Transfer filed by defendant to and including April 28, 1975, Orig. & 1 copy. DUPREE, J. (2 cert. copies to US Atty

Fil. & Ent. Short Form Deed of Trust of STEPHEN ROBERT SHEA, 4242 Calhoun St., Huntington Beach, California, in the amount of $17,000.00 to be used as security in lieu of cash bail for deft. MacDonald, Central District of California's Number MG75-3024M. Receipt by Cert. Mail #78966 of Deed acknowledge to Mr. Edward M. Kritzman, Clerk, Central Dist. of Calif., U.S. Court House, Los Angeles, California 90012.

DATE	PROCEEDINGS

Fil. & Ent. Short Form Deed of Trust of WILLIAM C. & CAROLYN G. HURST as sureties, 5441 Las Lomas St., Long Beach, Calif., in the amount of $15,000.00 submitted as partial justification to secure replacement bond for deft. MacDonald; received by Cert. Mail #780663 and receipt acknowledged to Edward M. Kritzman, Clerk, Central Dist. of Calif.

Fil, & ent, NOTICE OF MOTION: SUPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURES AND TO DISMISS THE INDICTMENT: Orig.

Fil, & ent, NOTOCE OF MOTION: SUPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41, Orig.

Fil, & ent, NOTICE OF MOTION: INSPECTION, REPRODUCTION AND COPYING OF THE RECORDS AND PAPERS IN THE CUSTODY OF THE CLERK OF THE COURT PURSUANT TO 28 U.S.C. 1867(a)(d) and (f) Orig.

Fil. & ent, NOTICE OF MOTION: INSPECTION AND COPYING OF GRAND JURY TESTIMONY: Orig.

Fil, & ent, DEFENDANT'S PRELIMINARY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY: orig.

Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY. Orig.

Fil, & ent, NOTICE OF MOTION: DISCOVERY AND INSPECTION OF DOCUMENTS, ETC. PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE, 16 Orig.

DATE	PROCEEDINGS

Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT BECAUSE OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL, Orig.

4/8/75 Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY, Orig.

4/8/75 Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL: Orig. C se filed to J Dupree in Raleigh, 4/24/75

4/25/75 Fil. & ent. RESPONSE TO MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY w/CS (2 CC to U.S.A. & cy. to J. Dupree)

Fil. & ent. GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL w/Attachments & C/S (2 CC to U.S.A. & 1 cy. to Judge)

Fil. & ent. GOVERNMENT'S RESPONSE TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIM. PROCEDURE 41 w/CS (2 CC to U.S.A. & cy. to Judge)

Fil. & ent. GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT BECAUSE OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL w/CS (2 CC to U.S.A. & cy. to Judge)

Fil. & ent. REPLY MEMORANDUM IN RESPONSE TO DEFENDANT'S "MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY" w/CS (2 CC to U.S.A. & cy. to Judge)

DATE	PROCEEDINGS

Fil. & ent. GOVERNMENT'S RESPONSE TO MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE AND TO DISMISS THE INDICTMENTS w/CS (2 CC to U.S.A. & Cy. to Judge)

Fil. & ent. RESPONSE TO MOTION FOR INSPECTION, REPRODUCTION AND COPYING OF THE RECRDS AND PAPERS IN THE CUSTODY OF THE CLERK OF THE COURT PURSUANT TO 28, U.S.C., Section 1867(a), (d) & (f) w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. GOVERNMENT'S MOTION FOR DISCOVERY w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. RESPONSE TO MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 16 w/CS (2 CC to USA & Cy. to Judge)

Fil. & ent. RESPONSE TO MOTION TO DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY w/CS (2 CC to USA & Cy. to Judge)

See pg. 3 for 4/26 filing)

Fil. & ent. RESPONSE TO MOTION FOR TRANSFER w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. SUPPLEMENT TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(b) w/Attachment (Official Airline Guide)

4/28/75 Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(e) (Judge has copy)

DATE	PROCEEDINGS

Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIM. PROCEDURE P. 16 (Judge has copy)

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(b) (Judge has copy)

Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY and AFFIDAVIT OF MICHAEL J. MALLEY and JEFFREY R. MACDONALD

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY and AFFIDAVIT OF MICHAEL J. MALLEY and RUTH ASTLE (Second Affidavit)

Fil. w/Judge Dupree: DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND MOTION TO DISMISS THE INDICTMENT AGAINST DEFENDANT

6/75) Fil. w/Judge Dupree: MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION

5/2/75 Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(a) (Sur Prejudicial Publicity) w/Appendices 1, 2 & 3 (Judge has copy)

DATE	PROCEEDINGS

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

5/5/75 Fil. & ent. SUPPLEMENTARY REPLY MEMORANDUM IN RESPONSE TO DEFENDANT'S "MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY" w/CS (see p. — for additional 5/5/75 filings)

5/6/75 Fil. & ent. DEFENDANT'S SUPPLEMENTARY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND COPYING GRAND JURY TESTIMONY

5/5-7/75 Hearing on Motions at Raleigh

5/5/75=10:00 a.m.— 1:20 p.m./3:00 p.m.—5:00 p.m. = 5 Hrs. 20 min.

5/6/75=10:00 a.m.—12:25 p.m./2:00 p.m.—5:00 p.m. = 5 Hrs. 25 min.

5/7/75=10:00 a.m.— 1:00 p.m./2:00 p.m.—3:35 p.m. = 4 Hrs. 35 min.

5/16/75 Fil. & ent. ORDER that deft.'s motion pursuant to 28 U.S.C., Sec. 1867(a)(d) & (f) for inspection of certain records and papers in custody of Clerk is denied. (DUPREE, J.) (CR O.B. #11, P. 300) (Ent. 5/16/75) Cert. cy. to Atty Segal—Air Mail & 1 Cert. Cy. to Atty. Stroud, Asst. U.S. Atty.

5/20/75 Fil. & ent. MEMORANDUM OF DECISION as to order denying deft.'s request for discovery. (DUPREE, J.) (CR. O.B. #11, P. 301) (Ent. 5/20/75) Cert. Cy. to Atty. Segal via Air Mail & Cert. Cy. to Asst. U.S. Atty. Stroud

DATE	PROCEEDINGS

5/21/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GOVERNMENT'S REPLY TO MOTION TO DISMISS FOR DOUBLE JEOPARDY w/Attachments (Cy. to Judge Dupree)

Fil. & ent. AFFIDAVIT OF BRIAN M. MURTAGH relative to wire tapping w/attachments

5/20/75 Fil. & ent. AFFIDAVIT OF FRANZ JOSEPH GREBNER, CO of Det. B, 3rd Military Police Group, Ft. Bragg, N.C., in 1970.

5/22/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

Fil. & ent. AFFIDAVIT of William F. Ivory, Spec. Agt., U.S.A. Crim. Invest. Command, Hqs., 2nd Reg., USACIDC, Heidelberg, Germany.

Fil. & ent. AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY and IN SUPPORT OF MOTION FOR INSPECTION SUR THE SAME MOTION (Third Affidavit)—Ruth Astle

Fil. & ent. SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISCOVERY OF RECORDS OF THE CLERK PURSUANT TO 28 U.S.C. 1860 et seq. SUR MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

5/23/75 Fil. & ent. MOTION FOR SANCTIONS AGAINST THE GOVERNMENT

5/22/75 Hearing on Motions at Raleigh

5/22/75=10:00 a.m.—12:30 p.m./2:00 p.m.—3:45 p.m.= 4 hrs. 15 min.

5/23/75=10:00 a.m.—12:30 p.m.=2 hrs. 30 min.

DATE	PROCEEDINGS

5/23/75 Fil. & ent. NOTICE OF APPEAL by deft. of Order entered 5/16/75 denying deft.'s Motion for Discovery of Jury Selection Records made pursuant to 28 U.S.C. 1867. Cy. to Segal & U.S. Atty. w/cy. of rules governing appeals. Cy. to Ct. Rptr. & 4th Cir. & J. Dupree.

5/5/75 Fil. & ent. AFFIDAVIT OF MAJOR DAVID B. REED, III, Hqs. U.S.A. Crim. Invest. Commd Washington, D.C.

Fil. & ent. AFFIDAVIT OF COL. JACK G. PRUETT, Chief, Office of Safety & Security/Provost Marshal, Hqs., Military Traffic Mgmt. Commd., Washington, D.C.

Fil. & ent. COPY OF TELETYPE from U.S.A.CID C. Heidelberg, Germany TO: RUEA DUA/COMUSACIDC Washington, D.C./CIJA

Fil. & ent. SUPPLEMENTAL REPLY TO DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 41 (e). w/attachments & Affidavit of Paul M. Stombaugh, Special Agt. FBI, Chief, Chemistry Branch, Physicis & Chemistry Sec., FBI Laboratory.

Fil. & ent. SUPPLEMENTAL REPLY TO DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION. w/attachments

Fil. & ent. GOVERNMENT'S REPLY TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL. w/attachments

See 6/12/75 entry on page 4

5/23/75 Fil. & Ent. PARTIAL TRANSCRIPT of argument on motions 5/22/75 at Ral.:19 pgs. Overby, Ct.R

DATE	PROCEEDINGS

5/23/75 Arraigned at Raleigh, N.C.—entered plea of not guilty, requested by jury, by private counsel.

Fil. & ent. ADDITIONAL MEMORANDUM OF LAW WITH REGARD TO GRAND JURY SELECTION PROCESS by Plff. w/Cert. of Ser.

Fil. &ent. AFFIDAVIT OF JAMES T. STROUD, Asst. U.S. Atty., re: statement of Ruth Astle in her affidavit of 5/19/75. w/attachments

5/29/75 Received cy. of Teletype Message: TO-Mr. Segal From: Gen. Crimes Sec., Crim. Sec. Washington, D.C.—Re: Freedom of Information Act Request for internal memoranda of the Justice Department—Denied by John C. Keeney, Acting Asst. Atty. Gen., Crim. Div.

5/30/75 Fil. & ent. ORDER GRANTING INSPECTION OF THE CLERK'S RECORDS re: selection process for Grand Jury which returned indictment & for prospective Petit Jury beginning 5/30/75—6/5/75. (DUPREE, J.) (CR OB #11, P. 302)

Fil. & ent. ORDER ON MOTION FOR TRANSFER—Motions of deft. for transfer of case to U.S.D.C., Central Dist. Calif. for trial are denied; case is transferred from Fayetteville Div. of this court to the Raleigh Division for trial; case set for trial in Ctrm. #1, 7th Floor, Fed. Bldg., 310 New Bern Ave., Raleigh, NC, at 10:00 a.m., Mon., 7/14/75. (DUPREE, J.) (CR O.B. #11, P. 303) CC to Mr. Stroud & Mr. Segal (Ent. 6/2/75)

Fil. & ent. ORDER that order dtd. 5/16/75, denying deft.'s motion for discovery pur. to 28 U.S.C., Sec. 1867(f) is vacated; deft. shall have untill close of reg. business day on 6/5/75 to complete discovery; such hearing as may be necessary on deft.'s motion under 28 U.S.C., Sec. 1867(a) shall be resumed on 6/6/75 in Raleigh at 2:30 p.m. Deft.'s filing fee for notice of appeal should be returned. (DUPREE, J.) (CR. O.B. #11, P. 304) (Ent. 6/2/75) CC to Mr. Stroud & Mr. Segal & Finance Deputy

DATE	PROCEEDINGS

6/2/75 Fil. & ent. NOTICE OF APPEAL by deft. of Order denying deft.'s motion for transfer made pursuant to R.21(a) & (b), F.R.Cr.P. (1 cy. taken to J. Dupree, 3 cys. to Atty. Segal, cy. to U.S. Atty. by Segal's secretary) Cy. to 4th Cir. w/Cert. cy. of docket entries

6/3/75 Fil. & ent. WITHDRAWAL OF APPEAL from Order of U.S. Dist. Ct., E.D.N.C., denying deft.'s Motion for Discovery of Jury Selection Records made pursuant to 28 U.S.C. 1867. 4 cys. to Atty. Segal Sect. who was delivering a cy. to U.S. Atty. 1 cy. to 4th Cir. Ct. of Appeals.

Fil. & Ent. ORDER GRANTING INSPECTION OF CLERK'S RECORDS w/regard to selection process for the Grand Jury which returned the Indictment in this case and for the prospective Petit Jury in the instant case. 2 cc to U.S. Atty. 1 copy for Clerk. DUPREE, J. (Cr. O.B. #11, P. 305)

6/12/75 Fil. & Ent. ADDITIONAL MEMORANDUM OF LAW WITH REGARD TO JURY SELECTION PROCESS AND JURY COMPOSITION, w/Certificate of Service; 1 copy. Clerk's copy to J. Dupree.

6/16/75 Cert. copy of ORDER ON MOTION FOR TRANSFER, filed 5/30/75, mailed to Clerk of the Fourth Circuit Court of Appeals, Richmond, Virginia, at the request of Asst. U.S. Attorney Jay Stroud. Cy of letter of transmittal to Atty Segal.

6/16/75 Cert. copy of Notice of Appeal from Order on Motion for Transfer mailed to Court Reporter Elizabeth Overby, P.O. Box 30101, Raleigh, N.C.

6/25/75 RECORD ON APPEAL from ORDER denying defendant's Motion to Transfer mailed to Fourth Circuit Court of Appeals, at Richmond, Virginia; Copy of INDEX mailed to counsel of record

DATE	PROCEEDINGS

7/2/75 Fil. & Ent. AFFIDAVIT of Dr. R.J. Hader and Mr. Bill Stines w/regard to supervising and directing a scientifically based sampling of the jury pool for US Dist. Ct., EDNC, together with Tables 1 thru 3 attached; 1 copy. (Copy to J. Dupree.

Fil. & Ent. MOTION OF ROBERT SADOFF, M.D. FOR TRANSCRIPT OF GRAND JURY TESTIMONY, w/Exhibit A attached and a Certificate of Service; Atty for Robert Sadoff—Adam Stein, Esquire, Chapel Hill, N.C., associated with David Ferleger, Esquire, Philadelphia, Pa.; 1 copy (Copy to J. Dupree. w/proposed order)

7/3/75 Issued NOTICE OF HEARING ON DEFT'S MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY on JULY 8, 1975, Courtroom #1, Federal Building, Raleigh, N.C.—to all counsel of record w/copy to Court Reporter Elizabeth Overby, Raleigh, and to Attys Adam Stein, Chapel Hill, N.C. & David Ferleger, Atty, Philadelphia, Pa.

Fil. & Ent. AFFIDAVIT of Shirley Ann Rodgers with regard to job as jury clerk and procedure for obtaining names for Master Jury Wheel, dated and sworn to on 6/16/75; 1 copy. (Copy to J. Dupree by U.S. Attorney)

Fil. & Ent. Gov.'s RESPONSE TO MOTION OF DR. ROBERT SADOFF FOR TRANSCRIPT OF GRAND JURY TESTIMONY, w/Cert. of Service; 1 copy (Copy to J. Dupree by US Atty)

7/7/75 Fil. & Ent. Certified copy of ORDER of COURT OF APPEALS DISMISSING defendant's appeal from an order denying a motion to transfer case to U.S. Dist. Court for the Central District of California, and the response of Jeffrey R. MacDonald for the reason that the order denying transfer is not appealable. c/John D. Butzner, Jr., with the concurrence of Judge Craven and Judge Russell.

DATE	PROCEEDINGS

7/7/75 Fil. & Ent. AFFIDAVIT of Asst. U.S. Atty. JAMES T. STROUD, JR., in connection with DR. SADOFF'S motion to obtain Transcript of his Grand Jury Presentation; 1 copy. (Copy to J. Dupree by US Atty)

Fil. & Ent. TRANSCRIPT of Defendant's testimony in a hearing on 3/22/75 upon defendant's Motions, to Supress Evidence; To Dismiss. 31 pages. Elizabeth Overby, Ct. Reporter.

7/8/75 Fil. & Ent. AFFIDAVIT of BRIAN MURTAGH; 1 copy. (Copy to J. Dupree)

Fil. in open Court DEFENDANT'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY w/two articles attached; 1 copy-to J. Dupree.

HEARING on M/Dismiss Indictment because of Discrimination in Selection of Grand Jury, held at Raleigh. Deft. allowed until July 18, 1975, to file Affidavit of Dr. Sperlich and further Memo of Law; Court time on 7/7/75: 5 hrs. on 7/8/75: 2 hrs. 55 min.

7/9/75 Fil. & Ent. THIRD SUPPLEMENTAL MEMORANDUM in support of M/Dismiss Indictment because of Discrimination in the Grand Jury; 1 copy. (Clk's Copy to J. Dupree)

Fil. & Ent. AFFIDAVIT in support of M/Dismiss Indictment because of Discrimination in Selection of the Grand Jury (FOURTH AFFIDAVIT); 1 copy. (Clk's copy to J. Dupree)

7/10/75 RECEIVED Record on Appeal on M/Transfer to Cent. Dist. of Calif; Appeal DISMISSED. Cert. Copy of Order dismissing appeal filed 7/7/75.

DATE	PROCEEDINGS

7/15/75 Fil. & Ent. AFFIDAVIT of DR. PETER W. SPERLICH in support of M/Dismiss Indictment because of Discr. in selection of Grand Jury, w/EXHIBIT "A" attached; 1 copy. & Cert. of Service on U.S. Attorney. Clerk's copy to J. Dupree

7/15/75 Fil. & Ent. SUPPLEMENTAL MEMO OF LAW in support of M/Suppress Evidence and to Dismiss Indictment, w/affidavits in support of said motion; 1 copy. Clerk's copy to J. Dupree.

7/8/75 Fil. & ent. PARTIAL TRANSCRIPT OF DR. PETER W. SPERLICH'S TESTIMONY AT RALEIGH, N.C., 7/8 & 9/75 (83 pgs—Henrietta Buck, Ct. Rptr.) Folder #5Fil. & ent. PARTIAL TRANSCRIPT OF DR. ROBERT J. HADER'S TESTIMONY AT RALEIGH, N.C. 7/9/75 (109 pgs—Henrietta Buck, Ct. Rptr.) Folder #5

7/17/75 Fil. & Ent. ORDER of Clerk, Fourth Circuit Court of Appeals DENYING the petition for writ of mandamus; cert. copy of 4th Circ. Order. Copy to J. Dupree.

7/21/75 Fil. & Ent. Deft's RESPONSE TO GOVERNMENT'S ADDITIONAL MEMO OF LAW w/regard to M/Dismiss Indictment because of discrimination in selection of Grand Jury; Copy to J. Dupree.

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Dismiss Indictment because of discrimination in selection of Grand Jury, AND Response to Gov's Additional Memo of Law regarding same dated 6/12/75; Copy to J. Dupree.

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Dismiss Indictment because of DOUBLE JEOPARDY, and AFFIDAVIT IN SUPPORT THEREOF; Copy to J. Dupree.

DATE	PROCEEDINGS

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Suppress pursuant to Rule 41, and AFFIDAVIT IN SUPPORT OF SAID MOTION; Copy to J. Dupree.

7/21/75 Fil. & Ent. CERTIFICATE OF SERVICE on Government of the above four filings on 7/21/75; Copy to J. Dupree.

7/28/75 Fil. & ent. ORDER OVERRULING MOTION TO DISMISS INDICTMENT—GRAND JURY SELECTION —Ordered that motion of deft. to dismiss indictment because of discrimination in selection of grand jury is denied. (DUPREE, J.) (CR. OB #— P. ——) (Ent. 7/29/75) CC to Atty. Stroud & Atty. Segal.

7/29/75 Fil. & ent. ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS—Motion for Inspection & copying of grand jury Testimony—Denied; Motion for Discovery & Inspection of Documents, Etc., Pursuant to Federal Rule of Criminal Procedure 16 as amended—Denied; Motion To Dismiss Indictment for Defects in Grand Jury Proceeding & Prosecutorial Misconduct before the Grand Jury—Denied; Motion to Dismiss Indictment because of Double Jeopardy and Collateral Estoppel—Denied; Motion to Suppress Evidence Obtained as a result of Unlawful Search & Seizure & to Dismiss the Indictment—Denied; Motion to Suppress Evidence Pursuant to Fed.R. of Cr. P., 41(e)—Denied; Motion to Dismiss Indictment for Denial of Right to Speedy Prosecution & Trial—Denied and deft.'s motion for leave to conduct further discovery in action is denied. (DUPREE, J.) (CR OB# —, P. —) (Ent. 7/29/75) CC to Attys. Stroud & Segal.

Fil. & ent. ORDER ON GOVERNMENT'S MOTION FOR DISCOVERY—deft's. discovery motion having been denied, the government's motion pursuant to R. 16(c) for leave to inspect & copy exhibits of deft. to be introduced at trial is also denied. (DUPREE, J.) (CR. O.B.# —, P. —) (Ent. 7/29/75) (CC to Attys. Stroud & Segal.

DATE	PROCEEDINGS

Fil. & ent. ORDER—that a special session of court be convened in Ctrm. #1, 7th Floor, Fed. Bldg., Raleigh, N.C., at 10:00 a.m., Mon., 8/18/75 for trial of this action; for purposes of the trial the Clerk shall summon 50 jurors to appear at 9:30 a.m., Mon., 8/18/75 & 50 additional jurors to appear at 9:30 a.m., on Tues., 8/19/75. Copies of order to be served upon counsel & deft., Jeffrey Robert MacDonald, 16052 Mariner Dr., Huntington Beach, Calif., by certified mail. (DUPREE, J.) (CR. O.B. #—, P. —) (Ent. 7/29/75) CC handed to Mr. Stroud & CC to Atty.

Segal & MacDonald by Cert. Mail #219888 & 219889. Segal's cy. of this order & others mailed Air Mail.

7/30/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DEFECTS IN GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY w/CS

Fil. & Ent. ROBERT SADOFF'S BRIEF in support of M/for transcript of his Testimony before the Grand Jury; 2 copies, 1 copy to J. Dupree. w/CERT. OF SERVICE.

8/7/75 Fil. & Ent. NOTICE OF APPEAL by defendant from Order entered 7/28/75 denying deft's M/D Indictment Because of Discrimination in the Selection of the Grand Jury; 1 copy. Copy to J. Dupree; Copies to counsel w/advice re Rules governing appeals.

8/8/75 Fil. Ent. NOTICE OF APPEAL by defendant from ORDER entered July 29, 1975, entitled "ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS", signed by F. T. Dupree, Jr., Judge; 1 copy. Copy to J. Dupree; Copies to counsel w/advice re Rules governing appeals; copy to Court Reporter, Elizabeth Overby.

DATE	PROCEEDINGS

8/10/75 Mailed RECORD ON APPEAL from Order denying defendant's Motion to Dismiss Indictment because of Discrimination in the Selection of the Grand Jury to U.S. Court of Appeals for Fourth Circuit at Richmond, Virginia; Copy of Index mailed to Counsel of Record.

8/12/75 Mailed RECORD ON APPEAL from ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS" entered July 29, 1975, signed by Judge Dupree, to U.S. Court of Appeals for Fourth Circuit at Richmond, Virginia. Copy of Index mailed to Counsel.

8/11/75 Mailed SUPPLEMENTAL Record on Appeal, VOLUME IV, from ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS to 4th Circuit Court of Appeals at Richmond, Va.

8/11/75 Issued NOTICE OF PRE-TRIAL CONFERENCE in J. Dupree's Chambers at Raleigh on Friday, August 15, 1975, at 10:00 a.m. (To all counsel of record)

8/12/75 Issued ORDER TO APPEAR for trial at Raleigh on Monday, August 18, 1975 at 1:00 A.M., Cert. Mail No. 17,254 & 17,255 to Jeffrey R. MacDonald, 16052 Mariner Dr., Huntington Beach, Calif. 92647 and C/o St. Mary's Hospital, Long Beach, California 90801.

8/13/75 Fil. & Ent. Mar's return on Subpoena: Exec. 8/8/75 on Franz J. Grebner, at 1547 Marlborough Road, Fayetteville, N.C.

8/13/75 Fil. & Ent. Mar's return on Subpoena: Exec. 8/8/75 at Tampa, Florida, by personal service on PAMELA KALIN and DONALD KALIN, W. Pearl & McDill Ave., S. Little General Offices &/McDill AFB respectively.

DATE	PROCEEDINGS

8/13/75 Fil. & Ent. Mar's return on Subpoena: RETURNED UNEXECUTED for the reason that Mrs. Janie Terry is now living at 226-B Cypress St., Grand Forks AFB, North Dakota.

8/14/75 Fil. & Ent. MOTION of Attorney DURANT WILLIAMS ESCOTT, for good cause shown, to withdraw as counsel of record for deft. MacDonald, w/Cert. of Service; 1 copy. Copy to J. Dupree. (Mr. Riley of Court of Appeals said to send ANY ORDER of our court, together with this motion, when filed.)

8/14/75 Fil. Gov's RESPONSE TO MOTION TO WITHDRAW, w/Cert. of Service; 1 copy. Copy to J. Dupree. Entered 8/15/75.

8/15/75 Fil. & Ent. Mar's return on Subpoenas as follows: Served 8/9/75 on Kenneth Gillespie, at Houston, Texas; on 8/11/75 on William Hancock, at Sanford, NC; and on 8/11/75 on John R. Nuchereno at Buffalo, New York.

8/18/75 Fil. & Ent. Cert. Copy of Court of Appeals' STAY ORDER AND ORDER ALLOWING APPEAL filed in U.S. Court of Appeals for Fourth Circuit on August 15, 1975, done by the clerk by direction of Judges Craven, Butzner, and Russell; xerox copy to J. Dupree.

8/18/75 Fil. & Ent. ORDER allowing Durant Wiliams Escott to withdraw as counsel of record for defendant R. MacDonald, and she is relieved of all further duties herein; DUPREE, J. Copy to Attys Segal, Escott & Stroud by Judges' office 8/18/75—to Segal by Cert. mail.

8/19/75 MAILED SUPPLEMENTAL RECORD ON APPEAL Volume I including Petition, Response and Order re Atty Escott's withdrawal as counsel, to Court of Appeals, Richmond, Virginia.

DATE	PROCEEDINGS

8/19/75 Fil. & Ent. PETITION of MRS. DOROTHY MacDONALD for Transcript of her Grand Jury Testimony; w/Cert. of Service; 1 copy. Copy to J. Dupree.

8/19/75 Fil. & Ent. PETITION of MRS. JUDITH ALVEY for Transcript of her Grand Jury Testimony, w/Cert. of Service; 1 copy. Copy to J. Dupree.

8/19/75 Fil. & Ent. the following Mar's returns:

Subpoena to Produce Doc. to *Manager, First Citizens Bk & Tr. Co.*, Fort Bragg, and to *Registrar or Clerk of Medical Records*, Chicago Wesley Memorial Hospital, 250 E. Superior St., Chicago, Ill., RETURNED UNEXECUTED at request of the U.S. Attorney.

Subpoena exec. 8/11/72 on *Hilyard O. Medlin* at Augusta, Georgia;

" " 8/12/75 on *Jeffrey Bronstein* at San Francisco, Calif.;

" " 8/12/75 on *Terry Laber*, at St. Paul, Minn.;

" " 8/12/75 on *Craig S. Chamberlin* at Champaign, Ill.; and

" " 8/13/75 on *George Gammel* at Columbia, Missouri.

8/22/75 Fil. & Ent. RESPONSE to Motion of MRS. DOROTHY MacDONALD for transcript of Grand Jury Testimony, w/Cert. of Service; 1 copy. COPY to J. Dupree.

8/22/75 Fil. & Ent. RESPONSE to Motion of MRS. JUDITH ALVEY for transcript of Grand Jury Testimony, w/Cert. of Service; 1 copy. COPY to J. Dupree.

DATE	PROCEEDINGS

8/25/75 Fil. & Ent. the following Mar's returns:

Subpoena to Testify: Exec. 8/14/75 by service on *Pirtia Styles*, Sec. to Mile Hoffman, Chief of Forensix Lab., Bureau of Alcohol, Tobacco & Firearms, IRS Bldg., 1111 Constitution Ave., N.W., Washington, D.C.;

Subpoena to Testify: Exec. 8/19/75 by service on *Richard D. Tevere*, 825 Madison Ave., NY.C.; and

Subpoena to Produce Doc.: Exec. 8/19/75 by service on *Mr. Tuxbury*, at 622 W. 168th St., New York, N.Y.

9/4/75 Fil. & Ent. the following Mar's returns:

Subpoena to Testify: Exec. 8/11/75 by service on *Dr. Martin Lonky*, personally, at 3546 Carriage Hill Cir., Randallstown, Maryland;
Exec. 8/11/75 by service on *Violet Kalin*, personally at 7714-B Ray St., Ft. Meade, Maryland; and
Exec. 8/12/75 by service on *John W. Chester*, 1010 St. Paul St., Baltimore, Md.

9/4/75 MAILED SUPPLEMENTAL RECORD ON APPEAL—VOLUME *VI*, consisting of the pretrial Exhibits, to Court of Appeals, Richmond, Virginia.

9/10/75 MAILED SUPPLEMENTAL RECORD ON APPEAL—VOLUME VII, consisting of the transcript of Hearing Upon Motions of Defendant before The Honorable F. T. Dupree, Jr., Vol. 1, Pages 1 through 587, filed Sept. 10, 1975, to Court of Appeals, Richmond, Virginia.

9/10/75 Fil. and Ent. TRANSCRIPT OF HEARING UPON MOTIONS OF DEFENDANT BEFORE The Honorable F. T. Dupree, Jr., Vol. 1, Pages 1 through 587, orig. only Forwarded to Fourth Circuit Court of Appeals.

DATE	PROCEEDINGS

9/10/75 Fil. & Ent. Mar's return on Subpoena to Testify: Return *unexecuted* per authority of AUSA—*not served* on Rebecca J. Cohen, 1811 Maness Court, Sycamore, Ill.

A True Copy, Teste:
John B. Whitty
Clerk

By /s/ Bonnie Bunn Perdue
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

INDICTMENT

(18, U.S.C., Sec. 1111)

The Grand Jury charges:

FIRST COUNT

That on or about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Colette S. MacDonald by means of striking her with a club and stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

SECOND COUNT

That on or about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Kimberly K. MacDonald, by means of striking her with a club and stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

THIRD COUNT

That on about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Kristen J. MacDonald by means of stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ [Illegible]
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JEFFREY R. MACDONALD, DEFENDANT.

No. 75-26-CR-3

NOTICE OF APPEAL

The Defendant in the above-captioned matter hereby gives Notice of Appeal of the Order of the United States District Court for the Eastern District of North Carolina, Dupree Jr., J., entered July 29, 1975, entitled "Order On Defendant's Remaining Pre-Trial Motions."

/s/ Bernard L. Segal
BERNARD L. SEGAL

/s/ Durant Williams Escott
DURANT WILLIAMS ESCOTT

Suite 220, 536 Mission Street
San Francisco, Ca. 94105

412 Law Building
Charlotte, N.C. 28202

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

CRIMINAL NO. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JEFFREY R. MACDONALD, DEFENDANT.

MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

The defendant, JEFFREY R. MacDONALD, respectfully moves this Court, pursuant to the Constitution and laws of the United States and to Federal Rule of Criminal Procedure 48, to dismiss the indictment against him because of the denial of his right to speedy prosecution and trial. In support of the said motion the defendant alleges as follows:

1. In February, 1970, the defendant, a medical doctor, was serving in the United States Army, attached to the Sixth Special Forces Group, at Ft. Bragg, North Carolina.

2. On February 17, 1970, the defendant's wife, COLETTE, and his two daughters, KRISTEN, age 3, and KIMBERLEY, age 6, were murdered, and the defendant stabbed and wounded by a group of intruders in the defendant's home, located on Ft. Bragg, North Carolina.

3. After the Army investigation failed to locate the perpetrators of the said crime, the Army, in April, 1970, caused the defendant to be arrested and charged with the murder of his family.

4. Pursuant to the Uniform Code of Military Justice (UCMJ) the charges against the defendant were submitted to an officer appointed pursuant to Article 32 of the UCMJ. The said officer conducted judicial proceedings

from June through September, 1970, including four full weeks of testimony in Court.

At all times throughout the said proceedings the Government was represented by counsel. The defendant was present at all times throughout these proceedings and was represented by counsel.

5. The Government presented all of the evidence known to it and which had been assembled as a result of the efforts of more than one hundred military and civilian law enforcement investigators. The said investigators had assembled evidence from several thousand witnesses in various countries throughout the world.

6. All physical evidence that had been obtained by the Government was subjected to intensive examination at the criminal investigation laboratories of the Provost Marshal General of the United States Army, located at Ft. Gordon, Georgia. The said evidence was also examined by other experts retained by the Government.

7. The Government called twenty-seven (27) witnesses in its case-in-chief against the defendant and in rebuttal to defense testimony.

8. The defendant offered a full defense to the charges against him at the said proceedings. He testified at length under oath and was subjected to a full and searching cross-examination by counsel for the Government. The defendant was also examined extensively by the Court itself.

9. The defendant called twenty-nine (29) witnesses on his behalf.

10. The Government was required by the Court to present all the evidence known to it in support of the charges against the defendant, and it did so.

11. In September, 1970, following the conclusion of these proceedings the Court made only two findings:

(a) The charges against the defendant were false.
(b) That the Government should pursue the investi-

gation of another named individual as a suspect in the murders of the MacDonald family and the assault on the defendant.

12. The conclusions of the presiding officer at the Article 32 proceedings were submitted to Major General Edward Flanagan, Commanding General of the John F. Kennedy Center for Special Warfare and U.S. Army Special Forces. The said conclusions were subjected to a full, independent judicial review by General FLANAGAN.

13. In October 1970 General FLANAGAN entered an order dismissing finally and with prejudice the charges against the defendant brought by the Government.

14. The order of General FLANAGAN dismissing with prejudice the charges against the defendant was subjected to an additional independent judicial review by Lt. General JOHN J. TOLSON, Commanding General of the XVIII Airborne Corps, Fort Bragg, North Carolina. Following the review by General TOLSON, he concurred in the adjudication by General FLANAGAN and affirmed the dismissal of the charges against the defendant.

15. On December 5, 1970, the defendant was Honorably Discharged from the Army.

16. From January, 1971, to January, 1972, the Criminal Investigation Division (CID) of the United States Army conducted what it contends was a complete, extensive and thorough reinvestigation of the murders of the MacDonald family.

17. In early 1972, the CID requested the United States Attorney for the Eastern District of North Carolina to seek an indictment of the defendant for the murders of his family.

18. The said United States Attorney failed, refused and neglected to seek an indictment in the said matter and took no substantive action on the requests for the indictment.

19. The defendant is advised, believes and therefore avers that in early 1972 the CID requested the Depart-

ment of Justice to direct that an indictment be sought against the defendant in the Eastern District of North Carolina.

20. From early 1972 until July, 1974, the Department of Justice failed, refused and neglected to act on the request of the Army to seek an indictment of the defendant. During the said period the Department of Justice took no substantive action on the request to proceed against the defendant. Further, no legally valid reasons existed for the delay in instituting any action against the defendant, except that there was no evidence to support such an accusation.

21. From early 1972 until July, 1974, the Department of Justice received requests from the defendant and from other persons that a final decision be made in regard to proceeding with the accusations against the defendant, including a speedy trial if he was to be accused.

22. On January 10, 1974, CARL W. BELCHER, Chief of the General Crimes Section, Criminal Division, Department of Justice, stated in writing that:

> ". . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time."

23. From January 10, 1974, the date of BELCHER's statement, until August 12, 1974, when the Grand Jury was empaneled which subsequently indicted the defendant, the Government obtained no additional new evidence against the defendant.

24. Despite the conclusion of Government Attorney BELCHER on January 10, 1974, the Department of Justice in July of 1974 instituted proceedings to have the accusation against the defendant submitted to the Grand Jury for the Eastern District of North Carolina which was to be empaneled August 12, 1974.

25. The decision of the Department of Justice on July, 1974, to submit the accusations against the defendant and seek an indictment of him before the Grand Jury was made as the result of pressures on the Department of

Justice from outside sources and not because any new evidence had become available to the Government.

26. The conduct of the proceedings before the Grand Jury from August 12, 1974, through January 24, 1975 were needlessly and negligently delayed by the Government in total and complete disregard of the defendant's right to a speedy disposition of the charges against him and of his right to a speedy trial.

27. The Government, by its own admission, obtained no new evidence against the defendant from September, 1970, until the commencement of the Grand Jury proceedings on August 12, 1974.

The Government, by its own admission, presented no new evidence to the Grand Jury.

The Government, by its own admission, has conceded that the only difference between the initial proceedings against the defendant in 1970 and the proceedings before the Grand Jury was that the physical evidence collected by the Government in 1970 was "reinterpreted" by Government technicians.

28. The physical evidence referred to above was available to the Government at all times from February 17, 1970 through January 24, 1975.

The technicians who reinterpreted the physical evidence were available to the Government at all times since February 17, 1970.

29. The failure, refusal and neglect of the Government to submit the said physical evidence for such interpretation from 1970 to 1975 was the result of negligence, incompetence and indifference on the part of the Government to the constitutional rights of the defendant.

30. The evidence that was used by the Government to obtain the present indictment, and that will be used against the defendant at his trial, together with the witnesses who will be called by the Government, have been known and available to the Government at all times in the years 1970, 1971, 1972, 1973, 1974, and 1975.

31. The United States Army and its Criminal Investigation Division have been in charge or actively connected with the investigation of the murders of the MACDONALD family from February 17, 1970, through the indictment of the defendant on January 23, 1975, to the present time.

32. The Federal Bureau of Investigation was actively participating in and connected with the investigation of the murders of the MACDONALD family in February and March of 1970, and throughout the Grand Jury proceedings in this case. The FBI was available at all times from March, 1970 until July, 1974, to assist in the said investigation if it had been requested to do so by the United States Army, the Criminal Investigation Division of the Army or the Department of Justice.

33. The failure of the Government to act to bring the defendant to trial until more than five years have elapsed since the criminal proceedings were initiated against him in April, 1970, under the circumstances set out herein, constitute a denial of the rights of the defendant to a speedy trial, as guaranteed by the Sixth Amendment, and to due process of law, under the Fifth Amendment to the Constitution of the United States.

34. No other relief than the dismissal of the indictment can vindicate the defendant's rights to a speedy trial, and to due process of law, which rights attached when the criminal proceedings in this matter were initiated against the defendant in April, 1970.

WHEREFORE, the defendant prays that Honorable Court order the above-captioned indictment against the defendant be dismissed.

Dated: April 5, 1975

/s/ Bernard L. Segal
BERNARD L. SEGAL

Suite 220, 536 Mission Street
San Francisco, California 94105

/s/ Durant Williams Escott
DURANT WILLIAMS ESCOTT
Attorneys for the Defendant

412 Law Building
Charlotte, North Carolina 28202

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

BERNARD L. SEGAL, ESQ., being duly sworn according to law, deposes and says that he is the attorney for the defendant in the foregoing Motion, that he has represented the defendant throughout the five (5) years of the proceeding which has resulted in the above-captioned indictment, and that the facts set forth in the within Motion are true to the best of his knowledge, information and belief.

/s/ Bernard L. Segal
BERNARD L. SEGAL

Sworn to and subscribed before me this 4th day of April, 1975.

/s/ Jack D. Franke
Notary Public in and for the County
of San Francisco, State of California

My Commission Expires: June 16, 1977

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 1975, a copy of the foregoing Motion was sent by Airmail, Certified Delivery, to:

The Honorable Thomas P. McNamara
United States Attorney
Eastern District of North Carolina
Post Office 26897
Raleigh, North Carolina 27611

Attention: Mr. James T. Stroud, Jr.,
Assistant United States Attorney

DATED: April 6, 1975, at San Francisco, California.

/s/ Bernard L. Segal
BERNARD L. SEGAL

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Criminal Case No.: 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY R. MACDONALD, DEFENDANT

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

Bernard L. Segal

536 Mission Street
Suite 220
San Francisco, Ca. 94105

Durant Williams Escott

412 Law Building
Charlotte, N.C.

Attorneys for Defendant

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I. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN DENIED BY THE UNREASONABLE AND UNNECESSARY DELAY IN BRINGING AN INDICTMENT AGAINST HIM.

A. *Purpose and Scope of the Sixth Amendment.*

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." In *Klopfer* v. *North Carolina*, 386 U.S. 213, 18 L. Ed. 2nd 1, 87 S.Ct. 988 (1967), the United States Supreme Court held that the right to a speedy trial was a fundamental right designed to protect every citizen of every state. In holding that the States were bound, under the Fourteenth Amendment, to enforce the Sixth Amendment, the Supreme Court said:

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English Law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right, . . .' The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." Id., 386 U.S. at PP. 223, 226; 18 L.Ed. 2d at pp. 8, 9.

The right to a speedy trial guarantees that a criminal defendant will not be forced to suffer prolonged pretrial anxiety over public accusation and the possibility that his defense will be hindered by a long delay. This purpose was recognized by the Supreme Court in *U.S.* v. *Ewell*, 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966) when it said:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to

trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." Id., 383 U.S. at p. 120, 15 L.Ed. 2d at p. 630.

The speedy trial guarantee must take into account the other constitutional safeguards afforded to a criminal defendant. Therefore, an exact time limit is not set for every stage of criminal proceedings. However, lack of a definite time limit is not a license for unreasonable and unnecessary delay. On the contrary, a criminal prosecution must move ahead with deliberate speed; and unaccountable lag in prosecution violates the defendants' Sixth Amendment right. The requirement was articulated by the Supreme Court in *U.S.* v. *Ewell, supra.*

> "In large measure because of the many procedural safeguards provided for an accused, *the ordinary procedures for criminal prosecution are designed to move at a deliberate pace.* A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *U.S.* v. *Ewell, supra,* 383 U.S. at p. 120, 15 L.E 2d at p. 631. (Emphasis added.)

The "deliberate pace" of a criminal prosecution required by the Supreme Court's interpretation of the right to a speedy trial is self-explanatory. By its terms it requires that every stage of prosecution be advanced to without undue delay. A prosecution cannot be slowed except to protect the constitutional rights of the defendant. Any unaccounted for delay contravenes the purpose of the Sixth Amendment. It violates the defendant's right to a speedy trial by exposing him to actual or constructive incarceration, prolonged anxiety and public ignominy and the possibility of an impaired ability to defend himself.

A determination as to whether the defendant has been denied his right to a speedy trial must be based on the facts of the particular case. If the charges are stale and the defendant is put in the untenable position of having to disprove his guilt the court must recognize that the defendant's right to a speedy trial has been denied through prosecutorial inaction and the defendant has been prejudiced thereby. The Supreme Court noted that such a situation is contrary to the law in criminal prosecutions:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, then the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases." *Dickey* v. *Florida,* 398 U.S. 30, 37, 26 L.Ed. 2d 26, 32, 90 S.Ct. 1564 (1970).

Against the background of the scope and purpose of the Sixth Amendment right to a speedy trial, this court is presented with the unique facts of the case at bar. The record discloses that in this case prosecution was delayed for four-and-a-half years by the Government. There was no valid reason for the delay. The only ascertainable reason for the delay is Government indifference to the defendant's constitutional right to a speedy trial and negligence in the pursuit of its duty to prosecute cases at a deliberate speed.

Because of this needless and unreasonable delay, the defendant in the present case, Dr. Jeffrey MacDonald has suffered prolonged anxiety caused by the unresolved public accusation of a heinous crime, the murder of his wife and two small daughters.

Dr. MacDonald's ability to defend himself has been impaired by the long delay since many of his witnesses are scattered far from the scene of the offense and their memories of the events have been clouded by the passage of time.

And, Dr. MacDonald has been under a "constructive imprisonment" in that his ability to freely travel outside this country or freely travel within this country without

being considered a fugitive has been severely, if not completely, curtailed by the possibility of having serious charges filed against him at any time.

By all of its inaction, the defendant's right to a speedy trial has been denied to him by the Government. The only remedy for such a denial is dismissal of the charges against the defendant. As will be seen in the following sections, the defendant's right to a speedy trial had attached in April, 1970. The criteria for determining whether that right has been denied show a manifest denial of that right and that dismissal of the charges against the defendant is the only remedy available to rectify such unconstitutional conduct.

B. *The Defendant's Right to a Speedy Trial Attached to His Arrest in April, 1970.*

1. *Arrest By the Army Began the Prosecution*

As a result of an investigation by the United States Army Criminal Investigation Division (CID) and the Federal Bureau of Investigation (FBI), the defendant, Dr. Jeffrey MacDonald, was arrested by the Army and charged under the Uniform Code of Military Justice with the murders of his wife and his two daughters in April, 1970. The arrest occurred two months after the February 17, 1970 murders of his family and the assault on himself.

Since the murders were committed on Federal lands, the Federal Government has exclusive jurisdiction over the prosecution of the offense. Since the particular Federal land is an Army installation, Ft. Bragg, North Carolina, the Army had primary jurisdiction over prosecution of the offense. However, concurrent jurisdiction is shared with the Department of Justice. If, for some reason, the Army had not proceeded with the prosecution of the offense, the Department of Justice would be required to carry out that duty.

Both the Department of Justice and the Department of the Army are departments of the Executive Branch of the United States' Government. Both the FBI and the

CID, which initially investigated the offense, are parts of the Executive Branch of the Government: the FBI is part of the Department of Justice; the CID is part of the Department of the Army. The relationship between the Department of Justice, the Army and their respective investigative division, as well as the nature of the Federal enclave jurisdiction, clearly indicates a monolithic governmental structure in this case. The Army's initial acceptance of jurisdiction was merely a matter of administrative convenience. The Department of Justice had broad prosecutorial jurisdiction and responsibility in this case from the outset. This is further confirmed by the CID's request that the Justice Department continue prosecution of the case against Dr. MacDonald after his Army discharge.

The arrest of an accused by one agency of the Government is the beginning of a single prosecution. It does not matter that the prosecution is later shifted from one agency and continued under the auspices of another. It nevertheless remains part of an on-going prosecution. In the present case, the arrest of Dr. MacDonald in April, 1970 was the beginning of the Government's prosecution of the murder charge and it was the time at which the defendant's right to a speedy trial attached.

The United States Supreme Court held, in *U.S.* v. *Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971), that a defendant's right to a speedy trial becomes effective upon his being *accused* of a crime, whether by arrest or by formal charge. The Supreme Court noted that:

> "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move

with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *Id.*, 404 U.S. at p. 313, 30 L.Ed. 2d at p. 474.

It is significant that the Supreme Court does not specify which department of the Government carries on the prosecution nor which department "accuses" the defendant. It is sufficient, for speedy trial purposes, that the Government accuse a person of a crime. Later in the same opinion the Supreme Court confirmed this by declaring:

> ". . . it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge." *U.S.* v. *Marion, supra.*, 404 U.S. at pp. 320-321, 30 L.Ed 2d at p. 479.

This is the only possible reasoning in light of the harms that the speedy trial provision is meant to prevent. If the court were to find that Dr. MacDonald's right to a speedy trial did not attach until his 1975 indictment by the grand jury, this court would be in conflict with the Supreme Court's holding that arrest itself causes the anxiety and ignominy which the Sixth Amendment is meant to prevent. The Supreme Court declared that:

> ". . . the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety to him, his family and his friends." *U.S.* v. *Marion, supra.*, 404 U.S. at p. 320, 30 L.Ed. 2d at p. 478.

There can be no doubt that the defendant in the present case was subjected to each and every one of these impositions when he was arrested on a charge of murder in April, 1970. It is of no import that he was arrested by one government agency rather than another. The curtailment of his liberty the anxiety and public ignominy and the disruption of his daily life was no less because he was arrested by the Army rather than by the Justice Department.

Because the government agencies had concurrent jurisdiction over the crime and because the defendant suffered the ignominy of arrest on a murder charge the defendant's Sixth Amendment right to a speedy trial attached at the time of that arrest in April, 1970. The unnecessary and unreasonable delay in pursuing the prosecution after that date violates the defendant's right to a speedy trial. The Justice Department's failure to seek an indictment from December, 1971 to January, 1975 denied defendant his right to a speedy trial on the murder charge against him. This denial requires the court to dismiss the indictment against the defendant, forever barring prosecution of the murder charge.

2. *Justice Department's Failure to Complete the Prosecution Violated Defendant's Right to a Speedy Trial.*

The charge of murder against the defendant was found to be false by the presiding officer at the Article 32 hearing conducted under the Uniform Code of Military Justice. The Article 32 hearing was lengthy and comprehensive. The presiding officer heard extensive testimony from both the Government and the Defense. The results of the investigations by the CID and the FBI were before the presiding officer. All the evidence available to both sides at the proceeding was presented to and examined by that officer. On the basis of that evidence, the presiding officer concluded that the charges against the defendant were false and that investigation should be aimed at another specified individual. The finding was upheld by two com-

manding officers whose duty it was to review the findings of the Article 32 court. They ordered the charges against the defendant dismissed finally.

After the findings were affirmed and the defendant was honorably discharged from the Army, the CID conducted a second year-long investigation of the murders. No new evidence was uncovered and the case remained as it had been presented at the Article 32 hearing. The Justice Department's jurisdiction over the offense did not end with the defendant's discharge from the Army. The CID presented its report to the Justice Department and requested an indictment be sought against the defendant on the murder charge. The Justice Department refused to indict.

When the defendant requested a disposition of the case on numerous occasions from early 1972 to July, 1974, the Justice Department declined to pursue an indictment against the defendant.

On January 10, 1974, the chief of the Justice Department Criminal Division stated in writing that there was insufficient evidence to warrant prosecution of Dr. MacDonald.

In August, 1974, with no more evidence than had been available the preceeding January, the Justice Department presented the case to the Grand Jury. An indictment against the defendant was returned in January, 1975.

Four years had passed from the time the defendant was discharged from the Army and the time the indictment was returned against him. Three years had passed from the time the CID had requested an indictment and the time the indictment was returned.

No reason for the long delay is apparent. The only possible explanation for the delay, short of indifference and negligence, might be a claim of prosecutorial discretion in initiating the indictment proceedings against an accused. Such a claim is without merit. The Justice Department was not free to leisurely take its time in prosecuting the defendant after the Army's dismissal of the charge. The Justice Department's jurisdiction over the case was concurrent with the Army's and continuous. All the evidence

gathered in the case was continuously available to the Justice Department. That this was the situation is obvious from the actions of those involved. The CID did not stop its investigation at the end of the Army's inquiry. Instead it conducted another investigation to attempt to add evidence to the Justice Department's case and then requested that an indictment be sought.

The defendant repeatedly requested a decision on the case, showing that he believed and knew that the Justice Department had jurisdiction over his case even without a separate action or investigation of its own. The Justice Department's answer, relying on the evidence presented by the CID, indicates its involvement from the initial investigation and its right to institute further proceedings in the prosecution.

Based on the situation as perceived by all involved, and in light of the Army's commencement of prosecution, the Justice Department had no right to refuse to continue expeditiously to prosecute the case. Nor was there any prosecutorial discretion to indefinitely delay prosecution based on the same evidence presented in the Army's Article 32 hearing.

The United States Supreme Court has ruled that the exercise of prosecutorial discretion in situations similar to the present case denies the defendant his right to a speedy trial.

In *Klopfer* v. *North Carolina*, *supra*, the defendant was indicted for criminal trespass and was promptly tried. However, the jury could not reach a verdict so the trial judge declared a mistrial and ordered the case continued. The county attorney gave notice of his intention to file a nolle prosequi with leave. The defendant objected but the court agreed. After another continuance, the defendant requested "to have the charge pending against him permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible." *Id.*, 386 U.S. at p. 218, 18 L.Ed 2d at p. 5. But, even though no justification for the nolle prosequi was given and in spite of the defendant's objection, the trial court grants the State's motion.

On appeal the North Carolina Supreme Court held that the defendant had a right to a speedy trial "if there is to be a trial." But the prosecutor's discretion determined whether or not a trial would take place. The State Court declared:

> "However, we do not understand the defendant has the right to compel the State to prosecute him if the state's prosecutor, in his discretion and with the court's approval, elects to take a nolle prosequi. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort" quoted in *Klopfer* v. *North Carolina, supra,* 386 U.S. at p. 219, 18 L.Ed. 2d at p. 6.

The United States Supreme Court, in a decision which resulted in the application of the speedy trial right to the States through the due process clause reversed the North Carolina Court. The Supreme Court first noted that the nolle prosequi with leave has the effect of giving the defendant his physical freedom without a requirement to appear in court at a later date. However, the nolle prosequi does not dismiss the charge, it merely postpones further prosecution at the discretion of the prosecutor. The defendant is denied the opportunity to exonerate himself at trial if the prosecutor decides not to try the case. And during that unlimited discretionary period, there is no means by which the defendant can obtain a dismissal or have the case put on the trial calendar. In *Klopfer, supra.* the Supreme Court found that the procedure violated the defendant's right to a speedy trial because it subjected him to the very impositions which the speedy trial clause sought to prevent. The Supreme Court found that:

> "The petitioner is not relieved of the limitation placed upon his liberty by the prosecution merely because its suspension permits him to go 'withersoever he will'. The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." *Id.*, 386 U.S. at pp. 221-222, 18 L.Ed. 2d at p. 7.

The defendant has moved, in a separate motion to which briefs have been filed, for the dismissal of the indictment against him on the basis that it is barred by the double jeopardy clause of the Constitution, and the doctrine of collateral estoppel. He presses that motion most vigorously. But, assuming arguendo, that the Court should ultimately reject that view, the impact of the *Klopfer* case must then be considered as it touches upon the defendant's speedy trial rights here.

In such a situation, the effect of the Justice Department's failure to pursue an indictment against the defendant in the present case is the same as that produced by the nolle prosequi with leave in *Klopfer.* Here the defendant has been tried on the murder charge and discharged from it by the Army. However, because of the Justice Department's concurrent and continuing jurisdiction over the offense, the defendant, although not in custody, was not free from further prosecution. The Justice Department could initiate proceedings to obtain an indictment against the defendant at any time. In spite of repeated requests to take some action on the charge, the Justice Department chose, for no valid reason to postpone action until three and one-half years after the defendant's discharge from the Army. During that time, although the defendant was free of physical custody he labored under the impositions of an unresolved charge of murder. The right to a speedy trial guarantees that a defendant will be free of these impositions as soon as possible after he is publicly accused of a crime. Even prosecutorial discretion cannot deny a defendant that right. And, the fact that he is free from physical custody does not sanction use of prosecutorial discretion which denies the defendant

the opportunity to exonerate himself at the soonest possible time. The Supreme Court declared that:

> "The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for the accused discharged from custody—has been explictly rejected by every other state court which has considered the question. That conclusion has also been implicitly rejected by the numerous courts which have held that a nolle prossed indictment may not be reinstated at a subsequent term. We too believe that the position taken by the court below is erroneous." *Klopfer* v. *North Carolina, supra*, 386 U.S. at pp. 219-221, 18 L.Ed. 2d at pp. 6-7.

The exercise of discretion not to prosecute by the Justice Department in the present case had the same effect as a nolle prosqui with leave. As long as the defendant had previously been subjected to prosecution on the same charge by an agency with concurrent jurisdiction with the Justice Department, the *Klopfer* decision is clear on point. As long as the prosecuting authorities fail, in the face of repeated requests for action, to complete a prosecution already begun, the defendant has been denied this right to a speedy trial. The prosecution's actions in the present case have severely curtailed the defendant's activities and created undue anxiety and concern over the pending prosecution in the defendant, his family and friends. The defendant has also been exposed to public scorn for an unnecessary length of time due to the Government's failure to complete prosecution of the murder charge. The defendant's Sixth Amendment right to a speedy trial has been denied and the Court must dismiss the charge against the defendant.

C. *Standards Which Determine A Denial of the Right to a Speedy Trial*

1. In General

In *Dickey* v. *Florida, supra*, Justice Brennan expressed dismay that the Supreme Court had not touched on the definition of the speedy trial right in its previous opinions. And, it did not reach the question in *Dickey*. Justice Brennan noted that:

> "It is timely to note that the Court has yet given scant attention to these and other questions essential to the definition of the speedy trial guarantee. Before *Klopfer*, only three of our opinions dealt at any length with the right, and each was decided with little analysis of its scope and content. . . . *Klopfer* itself attempted no extensive analysis; . . . And today we do not consider the effect of the application of the Speedy Trial Clause to the States. Thus although we said in *Klopfer* that the right to a speedy trial is 'one of the most basic rights preserved by our Constitution, . . . a guarantee as fundamental as any of the rights secured by the Sixth Amendment,' . . . we have yet even to trace its contours." *Id.*, 398 U.S. at pp. 40-41, 26 L.Ed. 2d at pp. 34-35 (Mr. Justice Brennan concurring)

In answer to that dissatisfaction, the Supreme Court, within a period of two years decided three cases which gave a clearer definition to the speedy trial guarantee of the Sixth Amendment. In *U.S.* v. *Marion, supra*, the Supreme Court defined the scope of the right on the various stages of criminal prosecution. In *Barker* v. *Wingo*, 407 U.S. 514, 33 L.Ed. 2d 92 S.Ct. 2182 (1972), the Supreme Court articulated the test to be used in determining whether a defendant has been denied the right to a speedy trial. And, in *Strunk* v. *U.S.*, 412 U.S. 434, 37 L.Ed. 2d 56, 93 S.Ct. 2260 (1973), the Supreme Court set down the remedy for denial of the defendant's right to a speedy trial.

In *Barker* v. *Wingo*, *supra*, the Supreme Court rejected the proposal that it formulate a rule that a criminal defendant be offered a trial within a specified time limit. (Suggested by the American Bar Association Project on *Standards for Criminal Justice, Speedy Trial*, 14-16 (approved draft 1968)). The Court also rejected a strict "demand-waiver rule" which would result in automatic and permanent waiver of his speedy trial right by a defendant who fails to demand a trial. The Supreme Court declared:

> "We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.*, 407 U.S. at pp. 529-530, 33 L.Ed. 2d at p. —.

But the balancing test is not a rigid test. It depends on the particular facts of the case before the Court, necessitating an "ad-hoc" approach by Courts to the speedy trial issues. Recognizing that a flexible test cannot be confined within rigid contours, the Supreme Court set down a bare outline to serve as a guideline for the lower courts when considering speedy trial issues. The Supreme Court said:

> "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors. Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, *supra*, 407 U.S. at p. 530, 33 L.Ed. 2d at p. —.

Each of these factors must be examined in the particular case before the Court. After examining the specific facts presented to it, the Court must weigh the conduct of both the prosecution and the defendant. Where the prosecution's conduct has had an adverse effect on the defendant's ability to obtain a fair and speedy trial, and the defendant's conduct has not contributed to that adverse effect, the Court must find that the defendant was denied his right to a speedy trial.

2. *Particular Facts in the Case at Bar.*

The defendant in this case at bar has been denied his right to a speedy trial. The factors to be weighed in determining whether the right has been denied are balanced in favor of the defendant in the present case:

(a) The length of the delay was extraordinary;

(b) the reason for the delay was the indifference of the prosecution to the defendant's constitutional rights and the breach of the prosecution's duty to prosecute a criminal charge at a deliberate pace;

(c) the defendant's assertion of his right was clear and unequivocal. Defendant asked that the prosecution against him proceed to disposition;

(d) Prejudice to the defendant is significant in that defendant's witnesses have moved away from the site of the offense and their memories of the events surrounding the offense has been clouded by the passage of time.

i) *Length of Delay*

The delay in the present case began in December, 1970. At that time the defendant was discharged from the Army. All charges relating to the murder of his wife and two daughters were dismissed by the Army as false. Defendant was, at that time released from Army jurisdiction.

The Justice Department had concurrent jurisdiction with the Army over the offense committed against the MacDonald family. The Justice Department's jurisdiction did not end in December, 1970. If the Justice De-

partment intended to pursue the prosecution, begun by the Army in April, 1970, the Justice Department had that opportunity and duty commencing December, 1970. It also had available to it all the evidence used by the Army in its prosecution. The Justice Department's failure to promptly pursue prosecution against the defendant in December, 1970 triggered a delay which lasted until January, 1975 when the defendant was indicted.

In a prosecution of such a serious nature, a triple murder, a four-year delay is extraordinary. A presumption of prejudice arises from such a delay of such length when the Court recognizes that no further evidence was gathered in the case from September, 1970 through January, 1975. And, from early 1972 to at least July 1974 no investigative work was done on the case. To allow a serious charge such as the one at bar to lie without investigation or prosecution for a four-year period creates a delay in the prosecution of the charge which weighs heavily against the Government in a consideration of its conduct of the case.

Even if the Court were to conclude that the delay did not begin with the defendant's discharge from the Army, it must find that the delay began when the CID finished its reinvestigation of the murders in January, 1972 and requested an indictment against defendant. At this point, the prosecution was put on notice that all the evidence available in the case had been gathered and was at its disposal. Failure to act on this notice triggered a delay which lasted three years. Since no further work on this serious charge was done after the CID request, the length of the delay is presumptively prejudicial and must weigh against the prosecution in the present case.

The Supreme Court said in *Barker* v. *Wingo*, *supra*, that the length of the delay is the factor which puts the entire determining process into action:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge." *Id.*, 407 U.S. at pp. 530-531.

It is clear that the case at bar is an extraordinarily serious and complex one. However, under *Barker*, the Court would not disapprove such a delay if it were for purposes of investigation and organization of the case. But, in the present case all investigation had been completed by the CID and the FBI prior to the Article 32 hearing. In fact, all the evidence had been marshalled and organized for that proceeding. The Justice Department had the bulk of its work done for it by September, 1970 when the Article 32 hearings were completed. Even allowing an extra year for CID reinvestigation of the case, the Court must find the length of the delay and the absence of any further action on the case during that period was an inordinate occurrence for so serious a matter.

Since no new evidence was discovered upon reinvestigation the prosecution should have gone foreward in early 1972 if it was warranted. Instead, the Justice Department waited, for no ascertainable reason, until August, 1974 to begin presenting its case to the Grand Jury. Although the Government contends that the MacDonald case was under investigation at all times, the record indicates no new evidence after September, 1970 and no actual investigation after January, 1972. Based on the record, therefore, the Government's assertions appear to be no more than the routine pronouncements of every law enforcement agency regarding its unsolved crimes: "The matter is still under investigation."

However well these assertions of ongoing investigations may appease the public or the press, they cannot be seen as an explanation for the denial to right to a speedy trial. At some point in time an investigation must be completed. In this case it was at least after the 1971-1972 reinvesti-

gation furnished no new evidence. To allow a prosecution to become stale while the Government sits on its collective hands is to effectively deny an accused the right to a speedy trial. One court has said that staleness of criminal cases reflects on the whole system of criminal justice:

> The United States Attorney has a duty to press criminal cases to trial, to give them any necessary priority, and to prevent, whenever possible, even the suggestion of staleness. And the trial court, which is the neutral arbiter for the defense as well as the prosecution, must do all it can to keep its criminal dockets current. . . . A staleness suggestion, which has any justification for its utterance, reflects on the court itself and on the administration of federal justice." *Hodges* v. *United States*, 408 F. 2d 543, 551 (8th Cir. 1969).

The trial courts in the District of Columbia have kept a vigilant watch on potentially stale cases by subjecting to close scrutiny those where more than one year has elapsed from arrest to trial. When such a case comes before the court, the Government must show that the delay was justified and that no prejudice was caused to the defendant. As the delay increases the Government's burden is heavier:

> "A delay of over one year between arrest and trial raise a Sixth Amendment claim of 'prima facie merit." It places on the government the necessity of justification, the burden of which increases with the length of the delay. When the delay approaches a year and a half as in this case, the Government must provide a justification which convincingly outweighs the prejudice which can normally be assumed to have been caused the defendant." *U.S.* v. Rucker, 464 F.2d 823 (1972); *U.S.* v. *Bradley*, —— F.2d (Cr. No. 73868, November 27, 1974).

The delay in the present case has caused the trial to occur more than five years after the offense and arrest. At least two and one half of those years entailed unjustified and unnecessary prosecutorial delay. Therefore, the court should carefully scrutinize that period and require the Government in the present case to bear the burden of showing justification for the delay which convincingly outweighs the prejudice which the court can presume has been caused the defendant.

The Government has no such proof since the delay was due to its own indifference and negligence. Therefore, the length of the delay should weigh against the Government in the Court's considerations.

ii) *Reason for the Delay*

a) *Pre-Indictment Delay*

In the present case, no reason is apparent for the four year delay between the defendant's discharge from the Army after the Army dismissed the charges against him, and the Grand Jury proceedings indictment.

The defendant was at all times ready and willing to go foreward with proceedings. He neither sought to postpone any prosecution nor did he attempt to evade prosecution. The record clearly indicates that the defendant was not the cause of any delay in the present case.

On the other hand, it is the Government's duty to take cognizance of defendant's right and bring cases speedily to trial. In the present case the Government neither brought the case to trial on its own, nor did it accede to the defendant's requests that a decision be made as to the status of his case. For three and one-half years no action was taken by the Government. In spite of the Justice Department's assertions that it was "investigating" the case the record indicates that no actual investigation occurred after January, 1972, two and one-half years before the Grand Jury was convened. And the statement of Carl Belcher, Chief of General Crimes Division on January 10, 1974, that " . . . the evidence currently available

in this case is insufficient to warrant prosecution of Dr. MacDonald," supports the inference that no new evidence had been obtained over a three-year period. From the circumstances of the case, it is apparent that any delay was the result of Government indifference and negligence. This type of conduct must weigh heavily against the Government an din favor of the defendant, who tried to assert his right to a speedy trial but was thwarted by the Governments actions.

In *Barker* v. *Wingo, supra*, the Supreme Court said:

> "Closely related to the length of delay is the reason the government assigns to justify the delay. . . . A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*, 407 U.S. at p. 531, 33 L.Ed.2d at p. 117.

In *U.S.* v. *Bradley, supra*, the District of Columbia trial court found that the prosecutor's constant requests for continuances were in violation of his duty to bring criminal cases to trial as well as violative of the defendant's right to a speedy trial:

> "It is clear that the delay from October 31, 1973, to December 21, 1974, was brough about by prosecution dilatoriness in presenting the case to the grand jury until the police investigation of a claim of brutality lodged by the two then misdemeanor defendants against the complainant officers was completed. At that point only Mr. Bradley was awaiting grand jury action, and the delay in presenting his case is unexplained . . . In light of the burden which the government bears, the lack of a satisfactory explanation leads the court to conclude that no justification exists for that delay; . . ." *U.S.* v. *Bradley, supra*, 103 Wash. Law Rptr. at p. 167, —— F.2d at p. ——.

The same unexplained delay is present in the case at bar. The Government, which bears the burden of bringing cases to trial, must bear the burden of explaining the delay. No reason but indifference and negligence appears for the failure to prosecute the case.

In *Barker* v. *Wingo supra*, the Supreme Court distinguished between delays caused by deliberate oppression intended to hinder the defense. Deliberate oppression is weighed to heavily against the Government while negligent delays, although still held against the Government, carry slightly less weight.

In the present case the facts show prosecutorial conduct that goes beyond mere negligence. The prosecutors in this case received numerous letters from defendant's counsel over a period of years requesting that *some* action be taken on defendant's case. Dr. MacDonald himself went in person to the Justice Department to request that action be taken on the case. He was refused an interview with prosecutorial authorities. No action was taken by the Government in response to the defendant's requests. Failure to act in response to such requests shows an attitude of gross indifference on the part of the Government toward prosecution of defendant's case.

This type of indifference cannot be categorized under the *Barker* opinions view of negligence. Rather, such indifference, in light of the unique facts of this case, is deliberate oppression intended to hinder the defense. Were it not such deliberate oppression, the Government would have acted on the requests, at least by granting Dr. MacDonald an interview or in some way responding to his personal request for action on the case.

Had the Government not wanted to hinder the defense, it would have given some indication to defendant's counsel that the case would be ready for prosecution at some definite time, not merely "under investigation" indefinitely.

The prosecutorial conduct exhibited in the present case is clearly classified in *Barker* as purposeful and oppres-

sive. It must be weighed heavily against the Government in determining whether the defendant has been denied his right to a speedy trial.

b) *Delay in the Conduct of the Grand Jury's Proceedings*

The total indifference that the Government has manifested toward the defendant's right to a speedy trial is highlighted by the manner in which the Grand Jury proceedings themselves were conducted.

The Grand Jury was convened on August 12, 1974. It returned the indictment against the defendant on January 23, 1975, more than six months later. With the single exception of its first week, the grand jury never devoted a full week of consideration to the defendant's case, although it was clearly the primary and most important matter before it. It met sporadically, weeks often went by without the grand jury meeting or considering the defendant's case.

The defendant does not know that the precise number of witnesses who were called before the Grand Jury in connection with the investigation of the death's of his family. However, he has reason to believe that they did not exceed 20 in number. And, that only a few of them required appeared for as long as two hours.

In view of this the question must remain, why did the Grand Jury require six months before it returned an indictment against the defendant? The answer is to found in the following facts:

1. The government's principal attorney, Victor Woerheide, took a five week European vacation in September, 1974. During Mr. Woerheide's vacation, the Grand Jury's investigation into this case was suspended. This occurred despite the fact that the United States Attorney for the Eastern District of North Carolina, Mr. McNamara, and his assistant, Mr. Stroud, were available and had been present throughout the grand jury proceedings to that point.

2. Mr. Woerheide caused the Grand Jury to be recessed again in December, 1974 because there was a serious illness to an adult member of his family. This occurred despite the fact that Mr. McNamara and Mr. Stroud were available and able to conduct the proceedings before the Grand Jury.

3. Because Mr. Woerheide, who works and lives in the Washington D.C., area, insisted upon exercising personal control of every aspect of the Grand Jury's work, he refused to delegate the conduct of the grand jury proceedings to McNamara and Stroud who were in Raleigh, North Caroline at all time during the proceedings. Had he been willing to set aside his unreasonable and adamant insistence that the Grand Jury meet only when it was convenient for him to come to Raleigh from Washington, the work of the grand jury would have been concluded at a considerable earlier time.

It is perfectly clear that the lackadasical tempo of the grand jury proceedings was entirely a function of the Government's inability or unwillingness to recognize the existence of the defendant's speedy trial right and to act expeditiously accordingly.

The Court in *United States* v. *Bradley* found that repeateded continuances which cause a case to proceed "langourously through the system" is evidence of "dilatory conduct" on the part of the prosecution. Such conduct jeopardizes a defendant's right to a speedy trial and, if combined with other questionable prosecutorial conduct (overcharging in *Bradley;* gross indifference in the MacDonald case) actually does deny the defendant his right to a speedy trial. 103 Washington Law Reporter, pp. 161, 165.

The grand jury proceedings in the present case are a prime example of dilatory prosecutorial conduct which, when combined with the previous delay in prosecution, has denied the defendant his right to a speedy trial.

iii. *Defendant's Assertion of His Right*

The defendant in the present case asserted his right to a speedy trial repeatedly both in person and through

counsel. Upon his discharge from the Army the defendant went to the Department of Justice in person, accompanied by Congressman Allard Lowenstein and attempted to see Assistant United States Attorneys General Will Wilson and Henry Petersen. Defendant's intention was to seek a resolution of the murder investigation. Neither Wilson nor Petersen would address themselves to the defendant's request for a decision as to the disposition of this case.

Counsel for defendant, Bernard L. Segal and Michael Malley, both carried on correspondence with the Justice Department on the defendant's behalf. Both counsel sought to ascertain the status of defendant's case. Counsel offered to submit their client to questioning by the Justice Department so that the Government might clear up any questions it had concerning defendant MacDonald's involvement in the charged offense. Counsel's letters, which range over a two and one-half year period are addressed to a number of highly placed Justice Department officials. The answers to counsels' letters are intentionally vague and inconclusive claiming that the case was "under investigation" and that questioning of Dr. MacDonald would be premature. At no time do any of the letters state that prosecution will be continued or that further prosecution is contemplated. In view of the foregoing it is clear that the defendant amply and adequately asserted his right to a speedy trial.

Assertion of the right to a speedy trial is a consideration in determining whether a defendant has been denied his right to a speedy trial. The Surpeme Court said, in *Barker* v. *Wingo*, that:

> "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right. We emphasize' that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*, 407 U.S. at pp. 531-532, 33 L.Ed. 2d at pp. 117-118.

In *Barker*, *supra*, the Court found it significant that Barker did not appear to want a speedy trial. The Court

concluded that Barker was gambling on acquittal of his co-defendant in which event Barker might never be tried.

A defendant's indifference to the delays in his prosecution is significant. Likewise, another defendant's desire for a speedy trial must also be significant. The defendant in the present case made repeateded attempts to assert his desire for a speedy trial. Failure of the prosecuting authorities to act on these requests is weighed heavily against them in view of their duty to bring cases to trial at a deliberate pace.

Insofar as the defendant's request for a speedy trial was made to the prosecuting authorities, the present case is analogous to those in which prisoners held in other jurisdictions request trial in a jurisdiction where an outstanding charge is pending against them. In *Smith* v. *Hooey*, 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969), the defendant was imprisoned in a federal prison in Kansas and had an outstanding Texas charge against him. Despite his repeated attempts for six years to be brought to trial on the outstanding charge, the Texas prosecutors took no steps to comply. The Supreme Court found that the defendant, even though imprisoned in another state, had a Sixth Amendment right to be brought to trial in Texas. Since the defendant could not initiate his own prosecution, the Court found that the Texas authorities had a duty to bring the defendant to trial upon request. The Court said:

> ". . . we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly. . . . Upon the petitioner's demand Texas had the constitutional duty to make a diligent good faith effort to bring him to the Harris County court for trial." *Id.*, 393, U.S. at p. 383, 21 L.Ed. 2d at p. 614.

The Fourth Circuit Court of Appeal has applied the *Smith* principle to prisoners within its jurisdiction. In *Kane* v. *State of Virginia*, (4th Cir. 1970), 419 F. 2d 1369, the Court agreed that when a prisoner requested to be brought to trial or to have the charges dismissed was met by refusal or inaction on the part of the

prosecutors, a denial of the right to a speedy trial occurs. The remedy is dismissal:

> ". . . the district court should discharge him from custody under the detainer and bar prosecution of the charges for which it was filed." *Id.*, 419 F.2d at p. 1373

According to the Court, this sanction is in keeping with the purpose of the Sixth Amendment. It also works as a warning to prosecutors that they have a duty to bring cases to trial, especially when requested to do so by the accused. To fail in this duty is to breach the public trust since there is then a "likelihood that the prosecutor's delay will thwart the public's interest in the prompt ascertainment and punishment of the guilty." *Kane* v. *State of Virginia, supra,* 419 F 2d at p. 1371.

The prosecutors in the present case were under an even stronger compulsion to proceed with the prosecution of the defendant's case. Here, not only was the defendant not a prisoner in some other jurisdiction which would make it difficult for the authorities to bring him to trial, but he came *in person* to the Justice Department to assert his right to a speedy trial and was turned away!

If the prosecuting authorities in *Smith* and *Kane, supra,* were under a constitutional duty to make good faith and diligent efforts to comply with prisoners' requests for trial, the authorities in the present case were under at least the same constitutional duty to proceed with the defendant's case when he presented himself to them in an attempt to assert his right to a speedy trial. The Justice Department's refusal to even talk with Dr. MacDonald is clear evidence of their disinterest in bringing the matter to a speedy trial.

Not only should the defendant's assertion of his right to a speedy trial weigh heavily in his favor in the present case, but it should weigh heavily against the government in view of their actions against the defendant.

iv) *Prejudice to Defendant*

The defendant in the present case has been prejudiced by the delay in bringing his case to trial. The defendant has been personally prejudiced because he has been forced to suffer the anxiety and concern of awaiting a possible public trial on the charged offense. Since the defendant has already undergone one trial on this same charge, he is doubly prejudiced by being aware of the physical and emotional strain occasioned by trial. Forcing the defendant to anticipate a possible trial for four years has caused him anguish and unbearable suffering that the speedy trial guarantee is specifically meant to prevent.

Defendant has also been prejudiced in the preparation of his defense. The offense in the present case occurred on an Army installation in North Carolina. Many of the witnesses at the Article 32 hearing were Army personnel who have since been transferred from North Carolina to places all over the world. Had the prosecution in this case been promptly brought, many of these witnesses would still have been stationed in North Carolina and easily available to the defense.

By delaying the prosecution, the Government has made it necessary for the defendant to scour the world for his witnesses and to keep track of their whereabouts for over four years. The fact that many of these witnesses are highly mobile Army personnel has made the task of keeping track of them a difficult one. *At this juncture the defendant is no longer certain where many of his witnesses are.*

Additionally, the witnesses in this case have been removed from the vicinity of the crime, some for years. The passage of time dims memories even when witnesses are near the scene of the offense and have constant reminders of the event. In the present case, the witnesses have been removed from the place of the event and risk not only the dimming of memory but the chance that some of them will remember the events only as a dream far removed from them in time and place. This is more likely in a case of the nature of the present one where three people were brutally murdred. Witnesses are more likely

to try to forget what happened after judicial proceedings than to try to constantly recall and think about the event. The result is that the defendant has been severely prejudiced by the delay in this case in that his witnesses have been subjected to both time and events which are certain to have a deleterious effect on their ability to testify.

The Supreme Court has found this type of prejudice to be the kind that weighs in favor of a dismissal of the charges. In *Barker* v. *Wingo, supra* the Court said:

> ". . . the inability of a defendant to adequately prepare his case shews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately the events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. . . . Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Id.*, 407, U.S. at pp. 532-533, 33 L.Ed 2d at p. 118.

There is no doubt that Dr. MacDonald has been subject to the kind of prejudice which denies him the possibility of a fair trial at this late date. In a serious charge as is present in this case, the memory of the witnesses is all important. Even though some of their testimony is preserved in the record of the Article 32 hearing, it is prejudicial to the defendant to have to constantly remind the witnesses of their prior testimony in order to refresh their memories. A jury observing that type of procedure cannot help but adversely judge the credibility of a particular witness. The prejudice to the defendant in such circumstances is obvious and incurable by anything except dismissal of the charges.

The Court must also weigh the prejudice to the defendant caused by his inability to properly confer with his witnesses and his great difficulty in keeping track of them. In *Smith* v. *Hooey, supra*, the Supreme Court found that a prisoner's incarceration in another jurisdiction was severly prejudiced by any delay in bringing him to trial in that he could not keep track of nor properly prepare his witnesses. The Court found that the defendant was prejudiced because:

> ". . . far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses or even to keep track of their whereabouts is obviously impaired." *Smith* v. *Hooey, supra*, 393 U.S. at pp. 379-380, 21 L.Ed.2d at p. 612.

The prejudice in the present case is no less simply because the defendant is not incarcerated. Due to the delay in prosecuting the charge, many of the witnesses available to the defendant have been placed beyond the reach or in places inconvenient for proper contact. Had the case been tried earlier, these witnesses would have been more easily available to the defense. It is clear that the disadvantage to the defendant in this case is the result of Government delay. And, therefore, the prejudice caused in this case should be weighed heavily in favor of dismissal because the defendant has been denied his right to a speedy trial.

3. *Balancing The Factors in the Present Case.*

The Supreme Court has offered guide lines to aid the trial court in coming to a proper decision in cases where denial of the right to a speedy trial is at issue. The Supreme Court has said:

> "We regard none of the four factors identified above as either necessary or sufficient conditions to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But because we are dealing with a fundamental right of the accused, this process must be carried out with full

recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution. *Barker* v. *Wingo*, *supra*, 407 U.S. at p. 533, 32 L.Ed. 2d at pp. 118-119.

In each instance in the present case, the weight of the factors is clearly in the defendant's favor.

1. A delay of four years after defendant's discharge from the Army and three years after investigation was completed in obtaining the indictment is a breach of the prosecutor's duty to bring criminal cases to trial at a deliberate pace.

   No portion of this delay can be attributed to the defendant. A delay of such length, for no ascertainable reason in a case as serious as the one at bar, is presumptively prejudicial to the defendant. Therefore, the weight of this factor must be balanced in the defendant's favor.

2. There is no valid reason for the delay. Although the Government claims it was investigating the case, the record shows that all available evidence was gathered before September, 1970 and that all active investigation was completed by January, 1972.

   The Government was not only negligent in failing to proceed to trial; it was also indifferent to the defendant's rights and to the need for a prompt decision in the case. This action, or lack of it, weighs heavily against the Government in view of the nature of the case, the prior hearings on the matter and the defendant's position as a result of the charges. Therefore, the weight of this factor goes against the Government and in favor of the defendant.

3. The defendant asserted his right to a speedy trial in person and through counsel. Defendant's attempts to see Justice Department officials to ascertain the status of his case and to request that some action be taken on his case were met with silence by those officials. The defendant's counsel wrote

numerous letters to the Justice Department asking about the status of the case and what action was being taken. The answers to those letters were vague, inconclusive and evasive, saying only that the case was "under investigation." At no time did the Justice Department take any affirmative action on defendant's case in response to defendant's assertion of his speedy trial right. Therefore, this factor must weigh most heavily in the defendant's favor.

4. The defendant has been prejudiced by the delay in prosecuting his case. Because of the inaction of Government prosecutors, the defendant has lived under a cloud of anxiety and suspicion for over four years. Additionally, many of the witnesses who would have been available to defendant had the case been tried promptly are now scattered throughout the world. If is difficult, if not impossible, for the defendant to locate all of these witnesses and to keep sufficiently in contact with them to properly prepare his defense.

   The witnesses themselve have been subjected to the dimming of memory caused by passing of time, as well as their removal from the vicinity of the events, thereby making the events about which they will testify remote as to both time and place. The fact that defendant has been prejudiced both personally and in the preparation of his defense should weigh heavily in his favor in a determination of the denial of his right to a speedy trial.

The overwhelming weight of the evidence shows that the defendant has been denied his right to a speedy trial. The balance of the four determining factors is heavily weighted in defendant's favor. Therefore, the Court must find that the defendant's right to a speedy trial has been denied and the charges must be dismissed.

D. *The Only Remedy For Denial of the Right To a Speedy Trial Is Dismissal Of The Charge.*

Because the defendant in the present case has been denied his right to a speedy trial by the Government's failure to pursue the prosecution of defendant for at least two and one-half years for no valid reason, the court must dismiss the charges against the defendant. Dismissal of the charges is the only remedy available to a defendant whose right to a speedy trial has been denied.

There are few reported federal cases where courts have found that defendants have been denied their right to a speedy trial. In *United States* v. *Strunk* (C.A. 7th 1972). 467 F.2d 969, the Court of Appeal attributed the sparsity of such cases to the lower courts aversion to the severe remedy imposed when the Sixth Amendment right has been denied. The court stated:

> "The remedy for a violation of this Constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the the severity of that remedy has caused the courts to be extremely hesitant in finding a failure to afford a speedy trial." Id, 467 F 2d at p. 973.

In view of this reluctance of the Court to find a denial of the rights, the Court of Appeals fashioned a remedy which was compensatory in nature, i.e., the Court remanded with instructions to credit the defendant with the period of time which had elapsed between the return of the indictment and the date of arraignment, three hundred and six days.

The United States Supreme Court granted certiorari solely on the issue of what remedy the courts should apply after finding a defendant has been denied his right to a speedy trial. In a unanimous opinion, the Supreme Court held that a compensatory remedy such as the one fashioned by the 7th Circuit Court of Appeals, no matter how flexible it might be construed, did not suit the purpose of the speedy trial right. The speedy trial right, said the Court is unique in that its denial cannot be cured as simply as can be denial of other rights. The Court said:

> "By definition, such denial (of the right to a speedy trial) is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory serve can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial. . . .—uncertainties that a prompt trial removes." *Strunk* v. *U.S.*, *supra*, 412 U.S. 434, 439, 37 L.Ed 2d 56, 93 S.Ct. 2260 (1973)

And, the Supreme Court held that the severity of the remedy and its effect on the criminal justice system are outweighed by the need to fulfill the purpose of the speedy trial right. The Court declared:

> "It is true that *Barker* described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed in practice it means that a defendant who may be guilty of a serious crime will go free, without having been tried.' . . . But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy.'" *Id.* 412 U.S. at pp. 439-440.

In light of the Supreme Court's holding, the court in the present case must not shirk from the finding that the defendant here was denied his right to a speedy trial simply because the court is reluctant to apply the remedy to a serious charge. Such action is disapproved of in the Supreme Court's finding that the policies behind the right require a severe remedy for denial. By implementing dismissal as the remedy, the Supreme Court has recognized that a defendant cannot be compensated by a "time credit" as fashioned by the Court of Appeal. Instead, the Supreme Court has found that time lost is irretreivable and all prosecution must be barred where once there was

a delay which denied the defendant his right to a speedy trial.

This is precisely the situation in the present case. The defendant here has been made, unnecessarily, unreasonably, and through no fault of his own, to suffer anxiety, concern and public scorn as well as the impairment of his ability to defend himself because of a delay in prosecution. The court cannot restore this time to the defendant nor can it cure the imposition resulting from the delay. Therefore, the court must employ the only remedy possible, dismissal of the charges against the defendant, thus barring further proseuction on the charges.

E. *Under F.R.Cr.P. Rule 48(b) The Court Must Dismiss the Charges Against the Defendant for Unnecessary Delay In Bringing An Indictment.*

The Court has the power, under Federal Rules of Criminal Procedure Rule 48 (b) to dismiss the indictment for unnecessary delay in presenting the case to the Grand Jury. Rule 48(b) is a non-constitutional speedy trial remedy, the exercise of which is placed within the discretion of the Court. The Rule is meant to cover those cases where the defendant's Sixth Amendment rights have been violated and those cases which the Court feels warrant dismissal even though no constitutional rights have been denied. Various courts have explained the purpose of the Rule:

> "Rule 48(b) obviously does not grant the Appellant less rights than the Sixth Amendment. Indeed, it places a stricter requirement of speed on the prosecution, and permits dismissal of an indictment even though there has been no constitutional violation." *Mathies* v. *U.S.*, (C.A.D.C. 1967), 374 F. 2d 312, 314-315.
>
> "Concerning appellant's argument that there was 'unnecessary delay in bringing defendant to trial' within the meaning of Rule 48(b), F.R.Crim.P., we agree that the rule imposes a more stringent standard that the Sixth Amendment as the Committee Note to Rule 48(b) states, part (b) 'is a restatement of the inherent power of the court to dismiss a case for want of prosecution.'" *U.S.* v. *Deleo*, (1st Cir. 1970), 422 F. 2d 487, 495.

The standards used for determining whether a Rule 48 (b) dismissal is warranted in a particular case, therefore, would not be as strict as those imposed for Sixth Amendment violations. One court has held that the purposefulness of a delay need not be shown. The defendant may prevail under Rule 48 (b) on a showing that a lengthy, unexplained delay did occur. The court said:

> "The Government argues that the defendants have the burden of showing that any delay in prosecution was 'among other things purposeful.' citing *Reece* v. *United States*, 5 Cir., 1964, 337 F. 2d 852: *Pollard* v. *United States*, 1957, 352 U.S. 354, 77 S.Ct. 481, 1 L. Ed. 2d 393; *United States* v. *Miller and Dubas*, E.D.Pa., 1966, 259 F.Supp. 294; *Davidson* v. *United States*, 8 Cir., 1963, 312 F. 2d 163. However, these cases deal with the Sixth Amendment, not with dismissal on non-constitutional grounds under Rule 48 (b). It is true that courts on occasion have referred to a lack of purposeful delay—along with other matters—in refusing to exercise their discretion to dismiss under Rule 48 (b). However, the cases do not suggest that it would be an abuse of discretion for a court to dismiss under Rule 48 (b) on non-constitutional grounds when lengthy delay, not necessarily purposeful, has been shown . . . . No effort was made by the United States Attorney to prosecute these cases prior to the conference called by the Court thirty-four months after the indictments were returned, and the United States Attorney offered no evidence to explain the failure to do so. The evidence is clear, then, that there has been 'unnecessary delay.' The Government's contention it must be presumed to have acted reasonably must fall before this evidence." *U.S.* v. *Mark II Electronics of Louisiana, Inc.* (D.C.La. 1968), 283 F. Supp. 280, 284-85.

The facts in the present case show that the defendant has been denied his right to a speedy trial. The overwhelming weight of the evidence shows that the government was indifferent to and negligent in bringing the case to trial. There is no valid reason for the delay in this case, thus bringing it within the "unnecessary delay" standard of Rule 48 (b). The Court has the inherent power to dismiss the charge for failure to prosecute.

The District Court in *U.S.* v. *McKee* (D.C.Wyo. 1971), 332 F.Supp. 823, exercised its discretion in dismissing a murder charge against the defendant where an indictment was delayed for five years and the defendant was at all times available to the Government because he was in custody. The Court found that:

> "At all times since October 3, 1965, defendant has been in custody either of the United States authorities or the penal authorities of the State of Oklahoma and, during all of said period, was readily available for trial upon the charges as set forth in both indictments. Delay in prosecution of the charge of murder was in no way induced by acts of the defendant or his legal counsel and defendant actually attempted to resist such delay by refusing to waive extradition to the State of Oklahoma. . . . Defendant was neither responsible for the dismissal of the first indictment nor for the failure thereafter, for a period of five years, to proceed further with respect to the charge therein contained. Defendant has been denied a speedy trial in violation of Rule 48 (b) of the Federal Rules of Criminal Procedure. *Id.* 332 F.Supp. at pp. 825-826, 827.

The facts in the present case are similar. The defendant was at all times available to the Government and attempted to resist and delay in prosecution. No delay or portion of it can be charged to Dr. MacDonald or his counsel. The sole burden for the delay rests with the Government.

II *Conclusion*

The inescapable conclusion from the Government's actions, or rather inaction, in this case is that the defendant's constitutional right to a speedy trial has been violated and that this is a case warranting Court action for "unnecessary delay" in bringing prosecution under Rule 48(b). Under such circumstances the Court must dismiss the indictment against the defendant.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

Criminal No. 75-26-CR-3

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

The United States of America, through the United States Attorney for the Eastern District of North Carolina, responds to defendant's Motion to Dismiss the Indictment for Denial of Right to Speedy Prosecution and Trial, filed herein on April 8, 1975, as follows:

The response made by the United States to defendant's Motion to Dismiss Indictment for Double Jeopardy and Collateral Estoppel answers in the counterstatement of facts the allegations here set forth in paragraphs "1" through "15" of defendant's Motion.

The unsupported conclusion that the defendant's rights have been violated, is rejected. The Indictment against Jeffrey MacDonald for the murder of his family on February 17, 1970, is not the result of someone "finding" this case in a file cabinet after five years and re-activating it for presentation to a Grand Jury. Rather, it is the culmination of years of investigative activity, much of it prompted by "red herrings" and diversionary leads furnished by defendant Jeffrey R. MacDonald himself, and by those individuals purporting to speak for him and on his behalf. It is also the result of a continuous study and analysis of physical evidence and weighing its import in assessing criminal liability.

If the Court will permit a few observations, of which, it is respectfully submitted, the Court should take judicial notice, the factual account that follows will be placed in the proper frame of reference.

(a) The population of a large military base, such as Fort Bragg, is in a constant state of fluctuation for the reasons that military personnel and their dependents are constantly being reassigned within the service, and personnel are continually entering the military service from and returning to civilian life.

(b) In an investigation involving a medical doctor the number of potential investigative leads stemming from personal association tends to be considerable. This is particularly true in the case of a young doctor as socially gregarious as Jeffrey R. MacDonald and one who had changed his residence as frequently in the recent past as has MacDonald. (Patchoge, L.I., N.Y., Princeton, N.J., Chicago, Ill., Bergenfield, N.J., Fort Bragg, N.C.)

(c) When a bizzare crime receives extensive media coverage, the incidence of false leads provided by those who are sincere and well meaning as well as by the cranks, the publicity seekers, the reward seekers, and those who may be paranoid and compulsive, and obsessed with a sense of guilt, multiplies geometrically. Much investigative effort is required to sift out relevant facts from those which are irrelevant, although often the result may not justify the effort expended.

(d) Normal turnover and reassignment of personnel in law enforcement agencies can extend the time required to complete an investigation. Such necessary and inevitable changes in personnel, with resulting slippage of time and continuity, are unavoidable in any Governmental or bureaucratic type organization.

I. *Counter Statement of Facts*

The investigation of the murders involved in this case must be divided into phases for the purpose of this response. We respectfully urge the Court to keep in mind that Jeffrey MacDonald, from the time of the murders was *not* the only subject of this investigation. However,

to the extent that special agents wasted their valuable time pursuing false leads to their logical conclusion, the wastage may be attributed directly to false information supplied by MacDonald as the only surviving eyewitness to the murders laid in the Indictment.

1. Phase one of the investigation extended from February 17, 1970, to October 23, 1970. It involved the Fort Bragg CID, the FBI, the Cumberland County Sheriff's Office, other co-operating local police agencies, and Colonel Rock's Article 32 proceedings. It culminated with Colonel Rock's Investigating Officer's report.

2. Phase two might best be called the Investigations of the Investigation. It covered the period from December 1970 through January 21, 1971. During this interlude, members of the Congress of the United States, the Secretary of the Army, the Inspector General of the Army, the Judge Advocate General of the Army, and the Commander of the United States Army Criminal Investigation Agency (USACIDA), were all involved in intensive investigations predicated upon allegations leveled by Jeffrey MacDonald and his counsel against many of those responsible for the first phase of the murder investigation. These allegations charged the commission of various acts of misfeasance, malfeasance and criminal negligence, including willful and negligent destruction of evidence, suppression of evidence, and perjury.

3. Phase three commenced when the Department of Justice, to whom the case had been referred, requested the Army to continue its investigative effort. Using the Fayetteville office of the United States Attorney as a base, a team of ten CID investigators and administrative personnel expended a total of twenty thousand man-hours during the eleven month period from January 21 to December 6, 1971. During this interval six hundred and ninety-nine interviews were conducted over a geographic area which included thirty of the continental United States, as well as Hawaii, Vietnam, Okinawa, Germany, The Panama Canal Zone, and Puerto Rico. An estimated four hundred intergovernmental contacts were made with various local law enforcement authorities which resulted

in one hundred and fifty-nine instances when some assistance was rendered to the investigators. The investigation proliferated into a number of mini-investigations, inquiring into the whereabouts and the alibis of numerous "hippies" and "drug culture types" in an attempt to identify those individuals who might fit the descriptions furnished by Jeffrey R. MacDonald, at the instigation of his attorneys, to a police artist in Philadelphia.

The Helena Stoeckley lead, furnished by Jeffrey R. MacDonald, may be cited as a prime example of obfuscation of the CID's investigation. William Posey, produced as a "mystery witness" at the Article 32 investigation, and who was furnished "escape" money by Jeffrey R. MacDonald's counsel, became non-available when the CID sought further information from him. Nevertheless the Posey lead was run out to its logical conclusion.

CID agents obtained fingerprints, hair samples, and photographs of each possible suspect contacted. The fingerprints and hair, which in every instance were supplied voluntarily by the possible suspect, were in each case sent to the crime laboratory for comparison and possible elimination. Photographs of each and every possible suspect were shown to Jeffrey R. MacDonald, who furnished no positive identification of any particular individual. In five instances polygraph tests were administered to possible suspects, all with negative results. Contrary to the defendant's allegation, the Government was not, as of 1970, in possession of all of the physical evidence which was evaluated in conjunction with the Grand Jury's investigation. It should also be noted that in the interval between the Article 32 and Grand Jury investigations, some crucial witnesses did not cooperate with Government agents and representatives out of fear for their personal safety.

Phase three continued through the spring of 1972. While it was in progress, the vast amount of raw investigative material collected was reduced to a multi-volume report of investigation. Likewise, on various occasions, there were conferences and exchanges of views between personnel of the United States Attorney's Office, the De-

partment of Justice, and the Army's CID, for the purpose of analyzing the facts and focusing on possible areas for further investigation.

4. Phase four commenced in June 1972 when the Army CID forwarded its report of investigation, including possible leads subject to further development, to the Department of Justice. During the summer of 1972 several conferences were held which included representatives of the Department of Justice, the United States Attorney for the Eastern District of North Carolina, members of his staff, and members of the Army CID's investigative team. Besides analyzing the facts set forth in the investigative reports, Government attorneys engaged in considerable legal research related to the peculiar facts and problems of this case.

In September, 1972, as the Court well knows, the incumbent United States Attorney for the Eastern District of North Carolina and his assistant most familiar with the case, left Government service. Thereafter, the General Crimes Section of the Criminal Division, Department of Justice continued to work upon the case, requesting that the Army conduct further investigation. The Army complied. In the spring of 1973, the present incumbent United Sttaes Attorney, having had an opportunity to review the voluminous report and visit the crime scene, also requested further investigative effort. The Army again complied. Thereafter, lawyers, both in the Department of Justice and the United States Attorneys office engaged in extensive review, analysis, and research, attempting to resolve the problems inherent in the case.

Finally it became apparent that these inherent problems could only be resolved by a thorough Grand Jury investigation, calling as witnesses before the Grand Jury all persons who might have knowledge of pertinent facts.

5. Phase five is the Grand Jury investigation of the whole matter. Jeffrey R. MacDonald was subpoenaed as a witness. With the benefit of advice from his attorneys he agreed to testify. He was advised of his Constitutional rights, advised that he was a suspect, afforded the opportunity to confer with his counsel, who was in attendance

to advise him in connection with his Grand Jury appearance, and ultimately testified in substance as he had in 1970. The Grand Jury's investigation, being exhaustive, was time consuming, but it was in no way needlessly delayed. Contrary to the assertion of his counsel, Jeffrey R. MacDonald was not indicted to satisfy any "outside pressure." Rather he was indicted because the Grand Jurors did not credit his testimony as thc only surviving eyewitness. Their disbelief was not the result of any pressure by the Government attorneys, but was based upon the fact that his story lacked credibility, when viewed in the light of all the circumstances in the case, considered in their entirety. Any delay involved in the investigation of this case or its presentation to a Grand Jury has been neither purposeful nor oppressive. Rather it has been the result of a conscientious effort to ascertain the true facts concerning an obscure incident, having only one surviving witness, who is in fact criminally culpable. Further, it involves a situation where the defendant presented many false leads to the investigators, diverting them into numerous blind alleys and causing them to concentrate their efforts on any vulnerable person whose appearance and style of dress might fit vague descriptions supplied by the defendant herein.

Defendant, in his Motion, implies that the Government, by some devious means, has kept the military charges alive and pending against him and that as the result of "outside pressures" the Grand Jury was coerced into returning a true bill based on these military charges. This simply is not true. The Grand Jury, acting quite independently as an inquisitorial body, indicted MacDonald because it was satisfied on all the evidence, including evidence provided by MacDonald himself and by witnesses called before the Grand Jury at his suggestion, that he had committed the offenses with which he is charged.

II.

The defendant's Motion to Dismiss, while making reference to alleged violations of his Constitutionally protected rights to due process under the Fifth Amendment, speedy

trial under the Sixth Amendment and speedy prosecution under Rule 48, Federal Rules of Criminal Procedure, provides no factual allegation of prejudice other than mere passage of time. He merely asserts that the Government was negligent and indifferent to his rights, but he fails to demonstrate how he has been prejudiced and how that prejudice will prevent him at this time from getting a fair trial. Consequently, the defense claim of a violation of due process has not been substantiated.[1] This is not a case where a man has been imprisoned for one crime, and doesn't learn of a detainer filed against him for another crime, until he has served seven years of his sentence and then emerges from prison sixteen years after the alleged crime to stand trial.[2] Nor is this case in any way analogous to the abuses condemned in *Petition of Provoo*,[3] in which the defendant was on trial for treason committed between 1942 and 1945, while a prisoner of war, and had been held without charge by the Army for the Justice Department, and was currently being re-tried in 1954. This case is clearly distinguishable from *Klopfer* v. *North Carolina*[4] which condemned post accusation delay occasioned by the filing of a nolle prosequi with leave by the Government. Jeffrey MacDonald has not been in jail prior to indictment, he has been continually represented by the same counsel, his defense is predicated on his account of the intruders' attack which has remained basically the same account since 1970, he is the only defense eyewitness, he has not been subject to public scorn and obloquy, he has not alleged the death or disappearance of any witness material to his defense; in short he merely claims denial of due process, he doesn't substantiate it.

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[1] In *Napue* v. *Illinois*, 360 U.S. 264 (1959), the State executed one of the eyewitnesses to a murder, and then tried Napue. The case also involves the Government's knowing use of false testimony. See also *Brady* v. *Maryland*, 373 U.S. 83 (1963) involving the suppression by the Government of an accomplice's confession in a separate trial.

[2] *Pitts* v. *State of North Carolina*, 395 F.2d 182 (C.A. 4).

[3] 17 F.R.D. 183.

[4] 386 U.S. 213 (1967).

The United States Supreme Court in reviewing the speedy trial question in *Barker* v. *Wingo*, 407 U.S. 514, (1972), rejected the inflexible time standard, which defendant now urges the Court to apply, in favor of a balancing test to be applied by Courts on an *ad hoc* basis. Although, *Barker* v. *Wingo* involved the issue of five years post arrest delay in bringing the defendant to trial, the opinion by Mr. Justice Powell is still pertinent to this case. Mr. Justice Powell wrote:

> "Thus unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself. 407 U.S. at 521."

Mindful of the societal consequences inherent in the application of a per se rule, the Court referred to its earlier opinion in *Beavers* v. *Haubert*:

> 'The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. 198 U.S., at 87.'
>
> "The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequences because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."

III.

The defense alleges that the time which elapsed between the commission of the murders and MacDonald's Indictment and arrest on January 24, 1975, has caused his Sixth Amendment right to a speedy trial to be violated, therefore he moves under Federal Rule of Criminal Procedure 48[5] for a dismissal of the Indictment. Presumably,

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[5] "Rule 48. Dismissal—(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint

the defense intends the Court to dismiss the Indictment pursuant to Federal Rules of Criminal Procedure Rule 48(b), 18 U.S.C.A. Clearly, that rule can have no application to this case, because until he was indicted on the 24th of January, 1975, he had never been held to answer to any district court. As Mr. Justice White said in *United States* v. *Marion*:[6]

> ". . . In any event, it is doubtful that Rule 48(b) applies in the circumstances of this case [38 month pre-indictment delay], where the indictment was the first formal act in the criminal prosecution of these appellees." See *Nickens* v. *United States*, 323 F.2d 808, 809 (CADC 1963), *cert. denied*, 379 U.S. 905 (1964); *Harlow* v. *United States*, 301 F.2d 261, 266 (C.A. 5), *cert. denied*, 371 U.S. 814 (1962); *Hoopengarner* v. *United States*, 270 F.2d 465, 469 (C.A. 6, 1959); *United States* v. *Hoffa*, 205 F.Supp. 710, 720-721 (S.D. Fla., 1962)

Justice White goes on to state that Rule 48(b) is clearly limited to post-arrest situations. Jeffrey MacDonald cannot claim that he was held to answer to the District Court before January 24, 1975. Further, there is ample authority for the requirement of a showing of prejudice in order to prevail under Rule 48(b).[7] Consequently, the defense's

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and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[6] 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468, note 4 (1971).

[7] *U.S.* v. *Lewis*, C.A. 7, 1969, 406 F.2d 486, *cert. denied* 89 S.Ct. 1630, 394 U.S. 1013, 23 L.Ed. 239; *U.S.* v. *McCarthy*, C.A. 2d 1970, 422 F.2d 160, dismissed 90 S.Ct. 1864, 398 U.S. 946, 25 L.Ed. 286; *U.S.* v. *Johnson*, D.C. Ill. 1969, 298 F.Supp. 58; *U.S.* v. *Lee*, C.A. 7th 1969, 413 F.2d 910, *cert. denied* 90 S.Ct. 595, 396 U.S. 1022, 24 L.Ed.2d 515, *U.S.* v. *Morris*, D.C. Pa. 1970, 308 F.Supp. 1348; *U.S.* v. *DeTienne*, C.A. 7th 1972, 468 F.2d 151, *cert. denied* 93 S.Ct. 974, 410 U.S. 911, 35 L.Ed.2d 274; *U.S.* v. *Bray*, C.A. 9th 1971, 442 F.2d 1064; *U.S.* v. *Ybarra*, C.A. 9th 1970, 430 F.2d 1230, *cert.*

argument falls because, absent formal restraints imposed on a putative defendant, the statute of limitations provides protection against possible prejudice. The Sixth Amendment speedy trial clause does not become applicable until the formal initiation of criminal proceedings whether by indictment, information or arrest and subsequent restraints on his liberty.

In *United States* v. *Marion*, there was a thirty-eight month delay between the last act in an alleged fraudulent scheme which covered a two year period and the return of the indictment. The Court, in rejecting the claim of prejudice stated unequivocally that the Sixth Amendment speedy trial provision has no application until the putative defendant becomes an "accused" by indictment.

The *Marion* case is so apropos to the circumstances of the case now before the Court, and the opinion itself is such an excellent exposition of the applicable law, that we are attaching a copy of it in its entirety as an appendix to this brief.

IV.

Congress in enacting 18 U.S.C.A. Sec. 1111 expressly provided that:

> ". . . Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life. . . ."

By extending the penalty provided in Section 1111 to the killing of officers and employees of the United States, Congress expressed its continuing intent to make murder in the first degree a capital offense.[8] Since murder under this statute can be a capital offense then there is no limita-

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denied 91 S.Ct. 589, 400 U.S. 1023, 27 L.Ed.2d 636; *U.S.* v. *Gross*, C.A. 8, 1969, 416 F.2d 1205, *cert. denied* 90 S.Ct. 1245, 397 U.S. 1013, 25 L.Ed.2d 427.

[8] 18 U.S.C.A. Sec. 1114, as amended Oct. 26, 1974, Public L. 93-481, § 5, 88 Stat. 1456.

tion on the time for returning an indictment.[9] The Indictment having been returned before the fifth anniversary of the crime, February 17, 1970, the Indictment is still within the statute of limitations [10] even if the death penalty is not at issue.

While the Speedy Trial Act of 1974 [11] does not become effective until July 1, 1975, it is relevant to the rebuttal of defendant's assertions, that Congress in reviewing the whole issue of speedy trial, did not provide relief for one who has not been held to answer either by indictment, information, complaint, or arrest. Congress obviously did not intend to change the time limits within which an indictment may be returned; if that had been their intention, the statute of limitations would have been amended.

For the reasons set forth above, and in view of the gravity of these crimes, defendant's Motion should be denied.

Respectfully submitted this 25th day of April, 1975.

THOMAS P. MCNAMARA
United States Attorney

BY: /s/ Victor C. Woerheide
VICTOR C. WOERHEIDE
Attorney, Department of Justice

/s/ James T. Stroud, Jr.
JAMES T. STROUD, JR.
Assistant United States Attorney

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney, Department of Justice

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[9] 18 U.S.C.A. Sec. 3281 "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing August 4, 1939.

[10] 18 U.S.C.A. Sec. 3282.

[11] 18 U.S.C.A. Sec. 3153-3156.

AFFIDAVIT

STATE OF NORTH CAROLINA)
) ss.
COUNTY OF WAKE)

BRIAN M. MURTAGH, ESQ., being duly sworn according to law, deposes and says that he is an attorney for the Government in this action and that the facts set forth in the within Response are true to the best of his knowledge, information and belief.

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney, Department of Justice

[SEAL]

Sworn to and subscribed before me this 25th of April, 1975.

/s/ Joyce W. Todd
Deputy Clerk, United States District Court
Eastern District of North Carolina

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Response to Motion to Dismiss Indictment for Denial of Right to Speedy Prosecution and Trial upon the defendant by depositing a copy of the same in the United States mail addressed to defendant's attorneys as follows:

Mr. Bernard L. Segal
Associate Professor of Law
Golden Gate University
536 Mission Street, Suite 220
San Francisco, California 94105

Ms. Durant Williams Escott
Attorney at Law
412 Law Building
Charlotte, North Carolina 28202

This 25th day of April, 1975.

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney,
Department of Justice

AFFIDAVIT

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

I, Kevin T. Maroney, being duly sworn, depose and state as follows:

I am Deputy Assistant Attorney General of the Criminal Division, United States Department of Justice, a position I have occupied since about April 1973. In that capacity, I became and continue to be directly responsible for work being done in various Sections of the Criminal Division, including the General Crimes Section. I am familiar with the work that was done by personnel of the Criminal Division with respect to the MacDonald murder and assault case. This case involved the violent deaths of Colette, Kimberly and Kristen MacDonald, an alleged assault upon Jeffrey R. MacDonald, their husband and father, and allegations by MacDonald of criminal misconduct by Army personnel who investigated the case. Jeffrey R. MacDonald was a suspect in the murder investigation. To the best of my knowledge and belief the following is an account of the activities of the Department of Justice in the matter.

The case initially was referred to the Department of Justice by the United States Army Criminal Investigation Command in June of 1972. The reports of the Army CID, the investigative agency, were voluminous. They filled 2 ½ file cabinet drawers. The case was assigned and reassigned to various staff attorneys, of the General Crime Section, who repeatedly reviewed and rereviewed the matter. Numerous conferences were held with the personnel of the Army's Criminal Investigation Command and with the United States Attorneys in Raleigh, North Carolina and their assistants. Various requests for further investigation were made. The CID did perform additional investigation, as requested, to the extent it was possible to do so, and the results were reported back to the Department of Justice.

The matter remained under active consideration and review in the General Crimes Section of the Criminal Division until July of 1974 when a decision was made to initiate an investigative Grand Jury proceeding in order to resolve certain inherent problems which were peculiar to the case. The case then was assigned to Victor C. Woerheide, Staff Assistant to the Assistant Attorney General of the Criminal Division, and he was given special authorization to initiate a Grand Jury investigation. At no time while the matter was assigned to attorneys in the General Crimes Section was a decision made to close it out as a non-prosecutable case. It remained at all times an open and active case, under constant reconsideration and review as various investigative alternatives were explored, leads were run out by investigators, and fragments of information were volunteered by persons attempting to be helpful.

The Grand Jury began its investigation on August 12, 1974 and continued to call witnesses and hear evidence until January 24, 1975. At that time the Grand Jury returned the indictment now pending against Jeffrey R. MacDonald.

/s/ Kevin T. Maroney
KEVIN T. MARONEY

[SEAL]

Subscribed and Sworn to before me this 22nd day of April, 1975

/s/ Sharon Schult
Notary Public

My commission expires: May 31, 1977

March 27, 1973

Address replies to:

Suite 220
536 Mission Street
San Francisco, California 94105
a/c 415 391-7800, ext. 372

Gary Kleinschmidt, Esq.
General Crimes Division
Criminal Division
Department of Justice
Washington, D.C.

Re: Dr. Jeffrey MacDonald

Dear Mr. Kleinschmidt:

I am writing to advise you that I am Chief Counsel for Dr. Jeffrey MacDonald. I am aware that you have been in contact recently with Michael Malley Esq., of Washington, D.C., who is also acting, together with me, as counsel for Dr. MacDonald.

I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. MacDonald to an in depth on-the-record interview by your offiece.

It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock.

I understand that at least one consideration that weighs in your decision is your concern for possible publicity that might emanate from Dr. MacDonald or his counsel as a result of such an interview. Let me state what should be obvious; Dr. MacDonald cannot in any significant way gain from such publicity. The publicity in regard

to your current review of the case allegedly stemmed from the release of information of persons connected with the Justice Department. While I understand you made assurances to Mr. Malley that corrective steps have been taken in this regard, I do not think that this argues for now denying Dr. MacDonald the opportunity to tell his story to you. In order to totally obviate this issue I would be willing to enter into a written agreement with the Justice Department binding all parties to make no comment about such an interview.

I would appreciate your reply.

Sincerely,

/s/ Bernard L. Segal
BERNARD L. SEGAL

cc: Michael Malley, Esq.
BLS:bew

DEPARTMENT OF JUSTICE
Washington 20530

Mr. Robert D. Wallick
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue
Washington, D.C. 20036

April 9, 1973

Dear M. Wallick:

Your letter of March 30, 1973, to Deputy Attorney General Sneed, concerning Dr. Jeffrey MacDonald, has been referred to me for consideration and reply. You indicated Mr. Michael Malley for your firm wished to outline for us facts developed in the course of earlier Department of the Army proceedings with respect to Dr. MacDonald.

Mr. Malley made similar proffers by telephone to my deputies and was informed on April 4 that his presentation at this time would be premature. When the time is appropriate, we will contact Mr. Malley and afford him an opportunity to make his presentation.

We trust this letter will serve to confirm the telephone conversations with Mr. Malley and that you will convey to him our appreciation for his interest in the matter. Whatever our intended disposition may be, his view of the facts will be of interest to us.

Sincerely,

/s/ Henry E. Petersen
HENRY E. PETERSEN
Assistant Attorney General

STEPTOE & JOHNSON

ATTORNEYS AT LAW

1250 Connecticut Avenue
Washington, D.C. 20036
(202) 223-4800

Honorable Joseph T. Sneed
Deputy Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Sneed:

Bob Wallick of Steptoe & Johnson called you several days ago about arranging a meeting between me and representatives of the Justice Department regarding the current review of the murders of the family of Dr. Jeffrey R. MacDonald at Fort Bragg, N.C. on February 17, 1970. As you know, the Army pre-trial investigation under the provisions of Article 32 of the Uniform Code of Military Justice, which lasted throughout the summer and early fall of 1970, the charges were dismissed after the Investigating Officer in a lengthy report to the Convening Authority stated that he believed the charges to be "untrue." During that proceeding, I was one of Dr. MacDonald's military attorneys.

Apparently the Department is reviewing the case with a view toward possible submission of charges against Dr. MacDonald to a grand jury. You were kind enough to call Mr. Peterson's office on my behalf; I spoke with Mr. Burke, Mr. Peterson's deputy, and with Mr. Shapiro, who I was told would conduct the final Department review of the case. Mr. Shapiro informed me that it would be "premature" for him or other officials at Justice to meet with me or with Mr. Bernard L. Segal, Dr. MacDonald's chief counsel, at this time.

I am taking the liberty of enclosing a lengthy letter I have sent to Mr. Shapiro outlining my views of the case. As you will note, in addition to being Dr. MacDonald's lawyer, I am a close friend of his, and I do not

hesitate to say that my knowledge of the case, makes me absolutely convinced of his innocence.

I am asking that the Department, in its review, consider that, functionally, there was a full trial on the merits of this case at Fort Bragg, and that to put Dr. MacDonald through another such procedure without the most pressing necessity to do so, will be financially ruinous to him, personally humiliating, and, most important, a cruel and deep blow to his already shattered emotional well being. My letter to Mr. Shapiro points out several factual considerations which I hope will be evaluated; but I do not feel ashamed of also asking that the Department consider Dr. MacDonald's human suffering as part of its review of this matter.

The important thing legally to remember about this matter is, a complete hearing has already been held, with both sides represented by competent counsel, with an impartial fact-finder who had the services of a legal advisor, and with legal review of the outcome by the Staff Judge Advocate. A full submission of evidence by both sides insured that the Investigating Officer was in a position to evaluate the merits of the case, as well as the truthfulness of Dr. MacDonald, who testified and was cross-examined at length.

In view of these facts, I suggest that the Department's own review of the matter should be governed by the principles in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), where the Court held that the doctrine of collateral estoppel was fully applicable to criminal proceedings under the Fifth Amendment. While I am not at this point arguing that *Ashe* squarely applies to a complete hearing under the provisions of Article 32 of the UCMJ, I am saying that the principles of *Ashe* certainly apply to Dr. MacDonald's case. First, there has been a complete hearing at which the government was fully represented and had the opportunity to fully litigate its case. See Mr. Justice Stewart's opinion for the Court, 397 U.S. at 443-447. The concurring opinion of Justice Brennan elaborates on the reason for not subjecting a man to prosecution for the same offense twice:

> [T]he State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. 397 U.S. at 450 (quoting from *Green* v. *United States*, 355 U.S. 184 (1957).

Mr. Chief Justice Burger's dissent in *Ashe*, emphasized that the Chief Justice objected to the idea that different, but related crimes, were to be treated as the same transaction. But in this case, the crimes alleged are exactly the same, as is the sovereignty. So the Chief Justice's objection in *Ashe* is not present in this case.

Although I know that your position does not permit you the time to personally screen matters which are handled routinely at other levels of the Department, I am asking you, if at all possible, to take whatever steps you feel appropriate to insure that Dr. MacDonald's case is carefully evaluated. I am confident that a fair review of what has already been done at the Article 32 will support my own personal belief that Dr. MacDonald's innocence has been established, and that his legal ordeal should not be prolonged.

Sincerely,

Michael J. Malley

MJM/lag

Enclosure

April 9, 1973

Harold P. Shapiro, Esq.
Deputy Assistant Attorney General,
Criminal Division
Room 2113
Department of Justice
Washington, D.C. 20530

Dear Mr. Shapiro:

I appreciate your taking the time to talk to me on the phone April 4. Again, I would like to reiterate the offer both Mr. Bernard L. Segal, Dr. Jeffrey R. MacDonald's chief counsel, and I have made to you and other representatives of the Justice Department, to make ourselves and Dr. MacDonald available for complete, on-the-record interviews at your convenience. Although I realize you have indicated to me that such an interview is "premature" at this point, I would like to make sure that the Justice Department's review of the entire case receives the fullest benefit from our cooperation that is possible.

As you know, I was one of Jeff MacDonald's military defense counsel at the Article 32 investigation into charges he murdered his wife and two children at Fort Bragg, N.C. on February 17, 1970. In addition, I am a close personal friend of his. I'm well acquainted with the "case" and with Jeff's character, and I would like to point out several things which I hope you will consider as you conduct your review.

I will not at this point attempt to review item by item the evidence which was presented to the Article 32 investigation. What I think should be kept in mind, however, is that the mass of physical evidence which formed most of the government's case did *not* point at Dr. MacDonald. No other conclusion is possible based on the official Article 32 Investigating Officer's report. I think it should be remembered that the physical evidence introduced at the Article 32, viewed in the light most favorable to the prosecution, simply pointed up the fact that neither Jeff nor the government has any complete explanation for the

terrible events of the night. Certainly the Article 32 Investigating Officer, Col. Warren V. Rock, was aware of the continuing difficulty in offering a coherent explanation of the case (*e.g.*, some of the blood stains, etc.).

However, I think it is fair to say that Colonel Rock did not overlook these difficulties in recommending most strongly that there was no legal or factual basis for charging Jeff with these crimes. I think it is also fair to say that the government had more than ample oportunity to attempt to show how the physical evidence supported its case to an impartial factfinder. Another examination of the same physical evidence offers no assurance of producing anything more than was accomplished the first time. Even assuming that doubts arising from the (then) unevaluated physical evidence (*e.g.*, some fingerprints, some candle wax, etc.) have been resolved by further laboratory investigation, nevertheless, the physical evidence as a whole still goes nowhere. There can be no doubt that this was all taken into account by Colonel Rock when he himself evaluated the case and concluded no prosecution of Jeff was warranted.

The fact that the physical evidence is inconclusive makes it all the more important to consider other elements of the case in determining at this juncture whether or not the government received at the Article 32 an adequate evaluation of its case against Jeff by the Army's own Investigating Officer. The other elements of the case are, of course, not quite as tangible as physical evidence. But they are as important, if not more so. For they involve the character of the crime, and the character of Jeff himself.

First it should be remembered that the crime is most bizarre. This obvious fact should raise two reasonable, but conflicting, inferences about the perpetrators: (1) the crime was committed by incredibly calculating and cold-blooded persons; (2) it was committed by a person or persons who were berserk in some sense. But neither of these descriptions fits Jeff, and this was fully explored at the Article 32.

The record is replete with testimony about Jeff's character and mentality. Highly qualified psychiatric testimony from both the Army and the defense characterized Jeff as "normal" in every way, and as someone who showed no tendencies toward the kind of complete loss of self control which could lead to the slaughter of Colette and their two children. The psychiatrist called by the defense stated that in his professional opinion, it is most unlikely that Jeff could have committed the crime. The Army's psychiatric panel from Walter Reed Hospital, through its spokesman, stated they believed Jeff was telling the truth to the panel when discussing the circumstances of the crime. They concluded that Jeff was not the kind of person who would lose total control of himself and that he has absolutely no history or other indication of psychiatric disorder. In short, there was no psychiatric reason to disbelieve Jeff, or suspect that Jeff's character pointed toward any kind of abnormal behavior that almost seems a prerequisite to the commission of such a hideous crime against his wife and two children. The question of drug abuse by Jeff or Colette was not even an issue, since there was not the slightest indication that either of them used or abused drugs.

Other witnesses who had known Jeff and Colette at various stages of their lives testified as to Jeff's stability, his complete normal and positive attitude toward his life, his family, and his profession. No one indicated that there was any reason to believe Jeff was or is the kind of person who would lose control of himself to such an extent that his entire personal life, the family he loved deeply, would be slaughtered by his own hands.

Moreover, there is absolutely no indication that there were other stresses in Jeff's life which might have "triggered" an unexpected but non-recurring psychotic episode of such tragic proportions. The record contains the testimony of the woman who rode home from the Fort Bragg extension of the University of North Carolina with Colette the last night of her life. By this woman's account, Colette was happy and content with her life as of about 10:30 p.m. It is difficult to imagine that within four hours there erupted, unexplainedly, such a gross provocation

by Colette or Jeff, or Jeff of Colette, as to lead to the complete and spontaneous abandonment of Jeff's entire life. There is simply no reason to suppose that Jeff lost control of himself that night and destroyed his family.

Likewise, there is no reason to suspect that Jeff is a cold-blooded and calculating killer, who, for some unnamed motive, planned his family's death. Even hypothesizing that there were marital difficulties or other personal problems between Jeff and Colette (which was absolutely not the case), all testimony about Jeff was that he is a very bright, rational, decent human being quite capable of dealing with his problems in a rational manner. The same was true of Colette. Certainly, the cold-blooded slaughter of his family was not a rational or even thinkable alternative to divorce, if there were marital difficulties which were plauging the MacDonalds. But in fact, there were no such marital difficulties. Although Jeff himself admitted to the CID in an interview on April 6, 1970, and to Colonel Rock that he had on several occasions had extramarital sexual relationships, there simply is no evidence that (a) these amounted to more than brief physical liaisons which never underminded Jeff's emotional commitments to Colette and his family; or (b) that Colette ever knew of them, thus providing her with an occasion to raise the issue of Jeff's fidelity. The proof of this latter point is Colette's contented attitude toward her life the last night she lived, and her repeated statements of her pride in Jeff. The proof of the former point lies in all the testimony about Jeff's devotion to his family, and, most importantly, in Jeff's own believability (as found by Colonel Rock) when Jeff said he loved Colette and his children more than anything else in the world.

As I said before, had there been serious marital difficulty, Jeff and Colette were smart enough and well adjusted enough to have sought relief in the more prosaic method of divorce. Murder simply is not a believable alternative in such a situation. Of course, the prosecutors at the Article 32 investigation certainly did not even attempt to suggest that these casual liaisons were a "motive," though they and Colonel Rock were fully aware of them.

What I have said about the crime and about Jeff's character should be considered in the further light that Jeff himself testified fully at the Article 32, and was subjected to the fullest cross-examination on his testimony. Certainly this is of extraordinary significance, because, without witnesses to the crime, and with physical evidence which goes nowhere and everywhere, it becomes very important to get a good "feel," not just for what the only witness available, Jeff, saw, but also to get a good feel for him as a man. And, it should be kept in mind that the observer of Jeff's testimony was an unemotional, experienced, and impartial observer, a career Infantry Colonel.

Of course, the detailed findings of Colonel Rock include a *specific* finding that Colonel Rock *does* believe Jeff. This should not be dismissed lightly. It must be remembered (I as an eyewitness and participant can assure you) that great demands were placed on both prosecutors and defense counsel by Colonel Rock and by each other to produce vast amounts of evidence. So Colonel Rock had as background from which to evaluate Jeff an unusual amount of information. He also had the opportunity to see Jeff and hear him tell his story in detail, evaluate whether Jeff's tears—the record does not reflect the fact that Jeff testified much of the time while he was sobbing—were real or feigned. The Investigating Officer had an opportunity to evaluate whether Jeff was sincere when he professed his love for his family, when he described his own confusion and inability to help them, and when he described his loneliness and loss. And, of course, Colonel Rock believed Jeff. That is of some importance in trying to decide whether Jeff is a cold-blooded killer who planned to rid his life of an unwanted family and contrive a story to explain the murders. It is also of some importance in trying to decide whether Jeff's affection for his family and his family's affection for him was so shallow as to be shattered by a supposed family quarrel or other spontaneous provocation which would lead to slaughter.

What I am saying, in short, is, Jeff really is an important—the *most* important—part of this case, and the government did receive a fair and thorough opportunity

to have Jeff himself evaluated. Psychiatric testimony, people long acquainted with Jeff, and Jeff himself, provided a good chance for the government's impartial factfinder, Colonel Rock, to weigh whether it was even thinkable that Jeff could have been capable of the crimes he was charged with. I think that a review of a cold record at this point without taking this into account, does a disservice to the government's own Article 32 investigation, and to Jeff. In this case, simply reading papers is not really an adequate substitute for the in-person evaluation Colonel Rock was able to provide.

I realize that, from the Department of Justice's point of view, perhaps the case was 'overtried" at the Article 32 stage. If this had been a routine grand jury proceeding, with the government presenting only its side of the case, perhaps an indictment could have been obtained. But you should remember that under military law, the Article 32 proceeding has long been held by the Court of Military Appeals to be a "dress rehearsal" for a full and complete trial. Certainly the prosecution was well aware of this fact. So it is not strictly correct to conclude that it was "premature" for the Army to bring the Article 32; nor can it be said that the defense "surprised" the government by its vigorous presentation of the Investigating Officer. The Army was well aware that, when it appointed an Article 32 officer who specifically requested the assistance of a qualified legal officer and former military judge as his legal advisor, a rather complete case was expected by all parties at the Article 32 level. Given the fact it was the United States which chose the time of the Article 32 investigation, and resisted the defense efforts for a continuance for the purpose of preparation, it is not fair to call the whole proceeding "premature" and simply dismiss it at that.

From the defense's viewpoint, it was and is our position that we had nothing to lose and everything to gain by full cooperation with any impartial factfinding process. From Jeff's point of view, we believe this should be done at the earliest possible opportunity, so as to minimize the time Jeff's life was disrupted beyond what had already happened to him. That is why we insisted on exercising

our right to present a "defense" at the Article 32. I do not think it would be fair now to use that against Jeff, by arguing that the government didn't get a chance to make a one-sided presentation to a *pro forma* investigating official.

Instead, what the government got at the Article 32 was a chance to evaluate its own case in the perspective of having complete access to the accused man himself—something that the government ordinarily does not get. Functionally, a full-blown trial was held. I suggest to you that, rather than distorting the pre-trial factfinding process, this enhances it for the government, and should be a major factor you now consider when you reevaluate this case. You should remember that not only was the government represented in the Article 32 by two prosecutors and by Colonel Rock, but the government received further protection by the fact that the military Convening Authority who appointed the Article 32 Officer had complete freedom under the Uniform Code of Military Justice to reevaluate the Article 32 record himself after receiving the opinion of his legal advisor, the Staff Judge Advocate. There was no legal obligation on the part of the Convening Authority to accept Colonel Rock's report if there was any doubt in anyone's mind that Colonel Rock had dealt fairly with any legitimate governmental interest. I hope you will remember that the Army legal system, which I served with some pride, like the Department of Justice, has as its primary responsibility the protection of the United States' best interests. Accordingly, I hope you will not discount the Article 32 process as simply a military matter which should not concern you.

Finally, I would like to say something about a human judgment which you must make in any decision to reevaluate this case. Jeff has spent a long time—three years—trying to get the tag ends of his life together again. Although he has partially succeeded, as his friend I know that there is still a great deal of loneliness and hurt that he lives with every day. Some of the things you must consider is, any sort of formal attempt to accuse him again will result in devastating publicity, enor-

mous financial loss, and personal humiliation to him. More importantly, the terrible strain that surrounded the Article 32 investigation—please keep in mind that the Article 32 was as exhausting and emotionally debilitating as any lengthy major criminal proceeding could be—would have to be relived, as would all the memories of the murders. I know as a friend of Jeff's that he lives with these memories every day. But now he is not compelled to spend every waking minutes with them; he is not compelled to go over and over in his own mind the details, the images of his family, dead, that are as vivid to him as the color photographs which form part of the record of the case, and which are so vivid to me.

During the Article 32, Jeff was compelled to lead such an existence, so that the government could assure itself that its laws were respected. But to make Jeff go through it again, without the most compelling necessity, simply is not called for. I am asking you to consider, in making your evaluation of this case, that the United States has already received a full hearing of the whole story of Jeff MacDonald's part in his family's death. That hearing permanently cut a part of Jeff's life out—I am sure you can understand that his reputation and his own emotional well-being have been permanently damaged by the necessity of undergoing the ordeal of a months-long hearing into allegations that he murdered the people he loved most in the world. Now that you are being asked to do this again, I hope you will consider that the interests of justice should require at least as much respect for the plight of a man whose life has already been tragically scarred by fate and the dictates of the law, as for the government which has already had the benefit of an exhausting and exhaustive evaluation of the case.

As I stated at the outset, I would like to have whatever opportunity I could to discuss the case with Mr. Segal. I am sure you appreciate my concern as Jeff's lawyer and his friend. I am sure you will understand that the matters which I have discussed in this letter are directed to you as the Justice Department's repre-

sentative who currently has authority to act in this case. I hope that if there are other officials to whose attention I should bring these comments, you will let me know.

Sincerely,

/s/ Michael J. Malley
MICHAEL J. MALLEY

MJM/lag

cc: Bernard L. Segal, Esq.
Hon. Joseph T. Sneed, Esq.

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

May 3, 1973

Mr. Michael J. Malley
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue
Washington, D.C. 20036

Re: *Dr. Jeffrey MacDonald*

Dear Mr. Malley:

This is in response to your recent letter to Mr. Shapiro concerning Dr. Jeffrey MacDonald, reiterating your offer to make Dr. MacDonald available for on-the-record interviews.

As indicated in our letter of April 7, 1973, to Mr. Wallick, we will contact you, and afford you an opportunity to make your presentation, at the appropriate time.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: /s/ Carl W. Belcher—A.L.H.
CARL W. BELCHER
Chief, General Crimes Section

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

May 3, 1973

HEP:CWB:GK:mdz
90-1-7-54
AIR MAIL
Mr. Bernard L. Segal
Suite 220
536 Mission Street
San Francisco, California 94105

Re: *Dr. Jeffrey MacDonald*

Dear Mr. Segal:

This is in response to your recent letter to Mr. Kleinschmidt concerning Dr. Jeffrey MacDonald, in which you joined Mr. Malley in urging the Department of Justice to accept your offer to submit Dr. MacDonald to an in-depth on-the-record interview.

Mr. Malley has previously made this proffer by telephone, and was informed on April 4, 1973, that such a meeting at this time would be premature.

Your letter indicates that you feel that recent publicity in regard to this matter stemmed from the release of information by persons connected with the Department of Justice, and that we "have made assurances to Mr. Malley that corrective steps have been taken in this regard." This is simply not the case. We advised Mr. Malley that the Department of Justice has released no information and has declined to comment on this matter since it involves a possible criminal prosecution which is still under investigation. We also advised Mr. Malley that reporters are apparently receiving their information from Mr. Kassab, and that articles published in the New York *Daily News* predicting an indictment date are mere speculation.

When the time is appropriate, we will contact you and Mr. Malley and afford you an opportunity to make your presentation.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: /s/ Carl W. Belcher—A.L.H.
CARL W. BELCHER
Chief, General Crimes Section

May 17, 1973

Address replies to:

536 Mission Street
Suite #210
San Francisco, California 94105
Telephone: 415-391-7800 Ext. 372

Carl W. Belcher, Esq.
Chief, General Crimes Section
United States Department of Justice
Washington, D.C. 20530

Re: Dr. Jeffrey MacDonald
Your File: HEP:CWB:GK:mdz
90-1-7-54

Dear Mr. Belcher:

I want to acknowledge receipt of your letter dated May 3, 1973. I look forward to the opportunity of discussing the MacDonald matter with you.

Sincerely,

BERNARD L. SEGAL

BLS:ben

January 8, 1974

Address replies to:

536 Mission Street
Suite #220
San Francisco, Calif. 94105
Tel. 415-391-7800 ext. 372

Carl W. Belcher, Esq.
Chief, General Crimes Section
United States Department of Justice
Washington, D.C. 20530

Re: Dr. Jeffrey MacDonald
Your File: HEP:CWB:GK:mdz
90-1-7-54

Dear Mr. Belcher:

It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.

I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice.

Sincerely,

Bernard L. Segal

cc: Michael Malley, Esq.
BLS:jg

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

January 23, 1974

Mr. Bernard L. Segal
536 Mission Street
Suite #220
San Francisco, California 94105

Re: Dr. Jeffrey MacDonald
File No. 90-1-7-54

Dear Mr. Segal:

This is in response to your letter of January 8, 1974 inquiring as to whether a final decision has been made regarding Federal criminal prosecution arising from the murders of Colette, Kimberly and Kristen MacDonald.

For your information, this case is under active investigation and will remain under consideration for the foreseeable future.

I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General

By: /s/ Carl W. Belcher
CARL W. BELCHER
Chief, General Crimes Section
Criminal Division

cc: Michael Malley
1250 Conn. Ave.
Wash., D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN R. KRONENBERG
UNITED STATES MAGISTRATE

No. MG75-3024M

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY ROBERT MCDONALD, DEFENDANT

TRANSCRIPT

Proceedings of January 29 and 30, 1975

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* * * *

[209] Your Honor, there is, I am sure, some questions about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.

At the time of the Article 32 hearing in 1970 when Dr. McDonald was released from the Army charges, much of the [210] scientific evidence that I've made available to you today was not available to the hearing officer at that time.

THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

MR. STROUD: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.

THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?

MR. STROUD: Yes, sir. The evidence was in existence the whole time. The bloody sheet, the bath mat and the—

THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?

MR. STROUD: That's correct.

THE MAGISTRATE: Very well.

MR. STROUD: We were not—Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.

Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

THE MAGISTRATE: It seems strange to me that they would have a four-week hearing. They did have a four-week hearing, didn't they?

MR. STROUD: The Article 32 hearing was longer than four weeks.

THE MAGISTRATE: And yet not conduct an adequate analysis.

[211] MR. STROUD: Well, Your Honor—

THE MAGISTRATE: It seems odd, doesn't it, Counsel?

MR. STROUD: Well, it took them a long time to analyze the evidence, Your Honor. And at the time of the completion of the presentation of evidence at the Aricle 32 hearing, many of the scientific results even from the CID Lab weren't back, even though the hearing was for a long period of time.

THE MAGISTRATE: All right; you may proceed.

MR. STROUD: Now, it's my position, on behalf of the Government, with regard to bail that of course the fact that there's no question that in the past the defendant has been cooperative. When he was subpoenaed before the Grand Jury, he appeared, as he's indicated.

Back in the Article 32 hearing, he was in custody.

He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service.

Since that time, it's been speculation as to what the outcome of this case might be. Now he knows that a Grand Jury in the Eastern District of North Carolina has indicted him--22 people. I don't know how they voted. But there were 22 people on the Grand Jury and they indicted him. They feel like there's probable cause to believe that he committed the first degree murders of his wife and his two children.

Now, that's certainly going to cause a change in his

• • •

REPORT AND CONCLUSIONS
PROCEEDINGS UNDER ARTICLE 32
UNIFORM CODE OF MILITARY JUSTICE

By Colonel Warren V. Rock
Presiding Officer

Filed October 13, 1970

[SEAL]

DEPARTMENT OF THE ARMY

HEADQUARTERS
UNITED STATES ARMY

John F. Kennedy Center for Military Assistance
Fort Bragg, North Carolina 28307

27 Nov. 1970

ATCMA-CG

Captain Jeffrey R. MacDonald
Headquarters and Headquarters Company
6th Special Forces Group (Abn)
1st Special Forces
Fort Bragg, North Carolina 28307

1. The inclosed copy of the report of the Article 32 investigating officer on the charges preferred against you on 1 May 1970 is furnished in response to your verbal request. You may also retain the copy of the verbatim transcript of witness testimony now in the hands of your appointed counsel, Captain James F. Douthat.

2. No copies of this material have been released to any person other than agencies of the government officially interested.

/s/ Edward M. Flanagan, Jr.
EDWARD M. FLANAGAN, JR.
Major General, USA
Commanding

Incl
as

CF:
TJAG, ATTN: JAGA

SUMMARIZED RECORD OF PROCEEDING
UPO ARTICLE 32, UCMJ
UNITED STATES versus
CAPTAIN JEFFREY R. MACDONALD

The investigation commenced at 1300 hours, 15 May 1970, at Fort Bragg, North Carolina. In attendance were the Investigating Officer, Colonel Warren V. Rock; the accused, Captain Jeffrey R. MacDonald, who was represented by his appointed counsel, Captain James F. Douthat. Also present were counsel for the government, Captain Clifford L. Somers; Captain Hammond A. Beale, Jr., legal advisor to the investigating officer; and Sergeant James R. Elkins, a clerk.

Colonel Rock informed the accused of his rights under Article 31, Uniform Code of Military Justice, and asked the accused whether or not he understood those rights as read to him. The accused responded, "Yes, sir".

Colonel Rock read to the accused verbatim each charge and specification, informed the accused of the name of the accuser, and each witness so far as known by the Article 32 officer. Those witnesses were as listed on page one of the Charge Sheet.

Colonel Rock informed the accused of his rights to counsel. Specifically, he informed the accused that he could retain civilian counsel at his own expense. Captain Douthat, the appointed defense counsel, stated that Mr. Bernard L. Segal and Mr. Dennis H. Eisman, whose address is Needleman, Needleman, Segal and Tabb, Suite 600, One East Penn Square Building, Juniper Market Street, Philadelphia, Penn. 19107, had been retained by the accused at his own expense.

Colonel Rock informed the accused that he could have military counsel of his own selection if reasonably available. Captain Douthat, the appointed Defense Counsel, stated the accused desired to be represented by Captain William deF. Thompson of the Office of the Staff Judge Advocate, 82d Airborne Division, Fort Bragg, North Carolina. Captain Douthat further stated that this re-

quest had been made in writing on 1 May 1970 to the Commanding General, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina. On 14 May 1970, the Commanding General stated that Captain Thompson had been made available to act as Assistant Trial Counsel in this case. Therefore, Captain Thompson was determined to be not reasonably available to act as individual defense counsel for the accused. Captain Douthat stated that he is appealing this decision. (Exhibit 1)

Captain Douthat stated that the accused desired to be represented by 2LT Michael J. Malley, and further stated that he formally requested Lt Malley on 1 May 1970, in correspondence addressed to the Commanding General, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina. He stated that to date no action had been taken on this request. (Exhibit 2) In order to expedite this request, Captain Douthat stated that he had written to the Chief, Personnel Operations, Attn: OPO-OPAD (Maj Johnston), DA, Washington, D.C., and submitted to Colonel Rock a copy of the letter, (Exhibit 3)

Colonel Rock advised the accused that he was entitled to be represented by counsel appointed by the officer exercising general court-martial jurisdiction. Captain Douthat stated that he believed himself to be such counsel. Colonel Rock asked the accused whether or not he desired to be represented by Captain Douthat. The accused stated, "Yes, sir". Colonel Rock determined that Captain Douthat was qualified under the provisions of paragraph 27(b) of the Uniform Code of Military Justice, and has been certified by The Judge Advocate General of the Army.

Before proceeding further, Colonel Rock asked the accused whether or not he had any objections to continuing with the procedural matters in the absence of his retained civilian attorneys, Mr. Segal and Mr. Eisman, or his requested individual military counsel, Captain Thompson and Lt Malley. The accused stated he had no objection.

Colonel Rock noted that the government was represented at these proceedings by Captain Somers. He then determined that Captain Somers was qualified under the provisions of paragraph 27(b) of the Uniform Code of Military Justice and has been certified by The Judge Advocate General.

Colonel Rock stated that because of the nature of this case, he had requested that a legal advisor be made available to him for the Article 32 investigation. He determined that Captain Hammond A. Beale, Jr., had been made available, was qualified under the provisions of paragraph 27(b), UCMJ, and was certified by The Judge Advocate General.

Colonel Rock then read to the accused applicable portions of paragraph 34, Manual for Courts-Martial, 1969, Revised Edition, reference the procedure for conducting an Article 32 investigation. The investigating officer then stated to the accused that he would consider any defense requests. to include requests for examination of the evidence. Captain Douthat then orally requested the following:

1. Any and all photographs of the scene;
2. All autopsy reports;
3. All laboratory reports;
4. The medical records of the accused;
5. Transcription of the taped interview of the afternoon session with the accused;
6. The tape records of interviews of the accused; and
7. In the event the tapes cannot be made available to the accused, then re-recordings of the tapes.

The investigating officer then inquired of Captain Somers when the government would be ready to proceed with the presentation of evidence. Captain Somers stated he would be ready to proceed in approximately two weeks. When the investigating officer asked Captain Douthat when the Defense would be prepared to proceed with the substance of the Article 32, Captain Douthat responded that at this time he could not state when the defense would be ready to proceed. Colonel Rock stated that the Article 32 investigation would continue at 0900 hours, 1 June 1970. The session was terminated at 1400 hours, 15 May 1970.

I have examined the foregoing summarized record and find it to be true and accurate to the best of my knowledge.

WARREN V. ROCK
Colonel, Infantry
Investigating Officer

Carol Butner	San Angelo, Texas enroute to Okinawa	E-4
1LT Edwin Casper	Flight Training School Fort Wolters, Texas	E-5
Winnie Casper	400 North 25th Street Mineral Wells, Texas	E-6
Robert H. Caverly	Federal Bureau of Investigation Fayetteville, North Carolina	E-7
SP4 Craig Chamberlain	USA Criminal Investigation Laboratory Fort Gordon, Georgia	E-8
John W. Chester	Post Office Box 767 Pinehurst, North Carolina	E-9
Susan Chester	Post Office Box 767 Pinehurst, North Carolina	E-10
Barbara Daw	119 LeBlanc Fort Bragg, North Carolina	E-11
CW2 Cornelius Daw	HHC, 6th Special Forces Group Fort Bragg, North Carolina	E-12
SGT Robert J. Duffy	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-13
Bobbie Sue Evans	426 Champagne Street Hamlet, North Carolina	E-14
DR Russell S. Fisher	111 Penn Street Baltimore, Maryland 21201	E-15 C-111
MAJ George E. Gammel	Womack Army Hospital Fort Bragg, North Carolina	E-16
CW3 Franz J. Grebner	Detachment B, 3d Military Police Gp (CI) Fort Bragg, North Carolina	E-17
CPT William F. Hancock	Womack Army Hospital Fort Bragg, North Carolina	E-18
CWO Bennie Hawkins	HHC, 503d Military Police Battalion Fort Bragg, North Carolina	E-19
DR Fredrick Herter	Columbia Presbyterian Hospital New York, New York	E-20
SP7 William F. Ivory	503d Military Police Battalion Fort Bragg, North Carolina	E-21

MAJ Severt Jacobson	Womack Army Hospital Fort Bragg, North Carolina	E-22 G-40
James G. Judson	Spring Lake Police Department Spring Lake, North Carolina	E-23
CW3 Donald L. Kalin	573d Personnel Service Company Fort Bragg, North Carolina	E-24
Pamela Kalin	542 Castle Drive Fort Bragg, North Carolina	E-25
Alfred Kassab	22 Bonnie Lane Stoney Brook, New York	E-26
COL Robert Kingston	1st Cavalry Division Republic of Vietnam	E-27
Josephine S. Kingston	2609 Ala' Wai Boulevard Honolulu, Hawaii	E-28
Elizabeth Ann Krystia	301 Spear Drive Fott Bragg, North Carolina	E-29
Carolyn Landen	2609 Downs Place Fayetteville, North Carolina	E-30
DR Paul Manson	1025 Hancock Street Quincey, Massachusetts	E-31
DR Robert McGann	9 Hawthorne Street Boston, Massachusetts	E-32
MSG Hilyard Medlin	USA Criminal Investigation Laboratory Fort Gordon, Georgia	E-33
SP4 Kenneth C. Mica	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-34 G-3
CPT Frank Moore	HHC, USAJFKCENMA Fort Bragg, North Carolina	E-35
Jean M. Morrell	2615 Gerard Avenue Evanston, Illinois	E-36
SP4 Dennis Morris	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-37
Marjorie Murdock	425 W. 21st Street New York, New York	E-38
CPT William P. Neal	Womack Army Hospital Fort Bragg, North Carolina	E-39

SP6 Michael D. Newman	Medical Company, Womack Army Hospital Fort Bragg, North Carolina	E-40 G-11
Vernon C. Park	Pelham, North Carolina	E-41
1LT Joseph L. Paulk	Co C, 503d Military Police Battalion Fort Bragg, North Carolina	E-42 G-2
William E. Posey	505 Myrtle Street Fayetteville, North Carolina	E-43
DR Robert L. Sadoff	The Benjamin Fox Pavillion Jenkintown, Pennsylvania	E-44
WO1 Robert B. Shaw	Detachment 1, 3d Military Police Gp (CI) Fort Bragg, North Carolina	E-45
Jan Snyder	Route 3 Fairmont, North Carolina	E-46
Robert K. Stern	1 Great Oaks Road New Hope, Pennsylvania	E-47
MAJ William H. Straub	Womack Army Hospital Fort Bragg, North Carolina	E-48 G-10
John D. Sutton	110 Spring Avenue Spring Lake, North Carolina	E-49
SGT Richard D. Tevere	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-50 G-4
1LT Mary Thoesen	Womack Army Hospital Fort Bragg, North Carolina	E-51
CPT Richard C. Thoesen	HHC, 7th Special Forces Group Fort Bragg, North Carolina	E-52
MSG Leo J. Violetti	Medical Company, 6th Special Forces Gp Fort Bragg, North Carolina	E-53
SSG David Weiss	Provost Marshal Investigator Fort Bragg, North Carolina	E-54
CPT James N. Williams	HHC, 6th Special Forces Group Fort Bragg, North Carolina	E-55
William G. Wolfgang	407 Belmont Drive Cherry Hill, New Jersey	E-56

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BEST COPY AVAILABLE

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1. 544 Castle Drive, Fort Bragg, North Carolina, and the contents therein

2. One (1) white bath towel with word "HILTON" and red brown stains (Exhibit G-73)

3. Blue pajama top which is torn and has red brown stains (Exhibit G-74)

4. Pocket from blue pajama top (Exhibit G-75)

5. Wooden stick approximately 30" x 1 1/2" x 1 1/2" (Exhibit G-79)

6. "Old Hickory" brand paring knife (Exhibit G-82)

7. White handled ice pick (Exhibit G-83)

8. Small paring knife marked "Stainless - Geneva Forge", with bent blade (Exhibit G-84)

9. Piece of board, split at one end, with white paint marks (Exhibit G-86)

10. Sample of floppy hat (Exhibit A-42)

11. Pajama top of COLETTE (Exhibit R-7)

12. Pajama bottom of COLETTE (Exhibit R-8)

13. Blue top sheet from bed in EAST bedroom (Exhibit R-9)

14. Multi-colored bedspread from bed in EAST bedroom (Exhibit R-10)

DEPARTMENT OF THE ARMY
HEADQUARTERS, 6TH SPECIAL FORCES GROUP (AIRBORNE), 1ST SPECIAL FORCES
Fort Bragg, North Carolina 28307

ATCMA-SF6-CO 2 May 1970

SUBJECT: Court-Martial Charges in the Case of Captain Jeffrey R. MacDonald, 112-34-8378, HHC, 6th SFG(Abn), 1st SF

Commanding General
U.S. Army John F. Kennedy Center for Military Assistance
Fort Bragg, North Carolina 28307

1. In compliance with paragraph 32f(4), MCM, 1969, there are forwarded herewith (Incl 1) court-martial charges which probably will not be disposed of either under Article 15, summary court-martial or by reference to a special court-martial.

2. Summaries of expected testimony and documentary evidence is with Det B, 3d MP Group (CI), Fort Bragg, N.C.

3. All material witnesses are expected to be available at the time of trial.

4. There is no admissible previous convictions of accused (para 75b(2), MCM, 1969).

5. The character of the accused's military service prior to the offenses charged has been excellent.

6. I recommend trial by general court-martial.

/s/ Francis B. Kane Jr.
FRANCIS B. KANE JR.
Colonel, Infantry
Commanding

1 Incl
as

Charge: Violation of the Uniform Code of Military Justice, Article 118

Specification 1: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Collette S. MacDonald, by means of striking her on the head with a club and stabbing her in the chest with a knife.

Specification 2: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Kimberly K. MacDonald, by means of striking her on the head with a club and stabbing her in the chest and neck with a knife.

Specification 3: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Kristen J. MacDonald, by means of stabbing her in the chest and back with a knife.

SUBJECT: Court-Martial Charges in the Case of Captain Jeffrey R. MacDonald, 112-34-8378, HHC, 6th SFG(Abn), 1st SF

HEADQUARTERS, UNITED STATES ARMY JOHN F. KENNEDY CENTER FOR MILITARY ASSISTANCE, Fort Bragg, North Carolina 28307 12 May 1970

TO: COL Warren V. Rock, Headquarters, Staff and Faculty Company, Institute Brigade, U.S. Army North Carolina 28307

1. You are designated to investigate the inclosed charges against Captain Jeffrey R. MacDonald, 112-34-8378, Headquarters and Headquarters Company, 6th Special Forces Group (Abn), 1st Special Forces, Fort Bragg, North Carolina 28307.

2. Your investigation will be conducted in conformity with paragraph 34, MCM, 1969 (Rev.), and Article 32, UCMJ.

3. You will contact the Office of the Center Judge Advocate for guidance and assistance prior to the commencement of the investigation.

4. The conduct of your investigation will take precedence over all other duties and responsibilities. A report of your investigation will be submitted in sextuplicate on DD Form 457 (Appendix 7, MCM, 1969 (Rev)) to reach this headquarters not later than 72 hours after receipt of this communication. If a delay in the completion of your investigation is required for good cause, you will furnish this headquarters periodic reports of your progress and the reasons for delay.

FOR THE COMMANDER:

/s/ Richard A. Baker
RICHARD A. BAKER
CPT, JAGC
Actg Asst Adj Gen

SUBJECT: Court-Martial Charges in the Case of CPT Jeffrey R. MacDonald, 112-34-8378, HHC, 6th Special Forces Group (Abn), 1st Special Forces

Headquarters, Staff and Faculty Company, Institute Brigade, United States Army Institute for Military Assistance, Fort Bragg, North Carolina 28307 15 May 1970

TO: Commanding General, ATTN: JA, United States Army John F. Kennedy Center for Military Assistance, Fort Bragg, North Carolina 28307

1. The subject Article 32 investigation was commenced at 1300 hours, 15 May 1970. After resolving some preliminary matters, I granted a delay in the proceedings, at the request of both counsel for the government and defense, until 0900 hours, 1 June 1970.

2. The defense counsel requested that the following evidence, listed on page one of the Charge Sheet, which the government has in its control be made available to the defense as soon as possible:

a. Any photographs of the alleged murder scene.

b. Autopsy reports.

c. Laboratory reports.

d. Medical records of the accused.

e. A transcript of the afternoon tape recordings of an interview with the accused.

f. All tape records of any interviews with the accused for purposes of rerecording by the defense.

3. Please advise if and when such evidence will be available to the defense.

/s/ Warren V. Rock
WARREN V. ROCK
Colonel, INF
Investigating Officer

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II

OPENING STATEMENT AND EXPLANATORY REMARKS

In order to fully appreciate and understand this report and its voluminous contents, it is deemed necessary to explain the rationale of the system adopted to report the same.

A verbatim transcript of the proceedings was taken and is included in this report in the order in which witnesses have testified. However, because of its obvious length and because much of the transcript does not concern itself with the relevant questions of the truth of the allegations, a summarized version of pertinent testimony was made (TAB V). All references to page numbers refer to the verbatim transcript.

In view of the fact that both government and defense were represented by counsel, the hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose.

When it became apparent that there would be a large number of exhibits offered by both sides, a system of numbering exhibits was established as follows: Government exhibits are G——, defense exhibits are A——, and my exhibits are R——. All other exhibits are numbered E——; e.g.; the sworn testimony of the witnesses.

It was necessary to devise a coding system to assist in understanding the results of the CID Laboratory Reports from Fort Gordon, Georgia, (see Exhibit E-59). Thereafter, these symbols were transferred to the Lab Reports and placed to the left of the particular exhibit. It is important not to confuse the 10's exhibit numbers (G, A, R and E) with the exhibit numbers used by the Lab. The meaning of their particular numbering and lettering system is explained in the Prefix Key (Exhibit G-27). Diagrams are provided of each room of the house (G-20 thru G-25) showing the approximate location of certain blood samples and the blood type when identified. Expanded diagrams of the floors, walls and ceilings (G-87 thru G-96) show additional blood locations and, in red ink, the location of identified/unidentified latent finger and palm prints.

For purposes of this report bedrooms are referred to by compass direction. The EAST bedroom is the same as the master bedroom (where COLETTE and the ACCUSED were found), the SOUTH bedroom the same as the front bedroom (where KIMBERLY was found) and the NORTH bedroom the same as the rear bedroom (where KRISTEN was found).

Throughout the transcript and summarized testimony there are references to blood types. It is important to remember that the blood types for the MACDONALD family are as follows: COLETTE—"A"; the ACCUSED —"B"; KRISTEN, the youngest daughter—"O"; and KIMBERLY, the oldest daughter—"AB".

When one reads the verbatim transcript, there are, in many instances, many pages devoted to a seemingly important issue. Thereafter, in the summarized testimony there is no mention made. It is essential to understand that because of the bizarre nature of the case, the Article 32 Investigator sometimes proceeded down blind alleys resulting in answers which, in the final analysis, were neither relevant nor necessary to his recommendation. Therefore, such areas of inquiry are excluded from specialized treatment in the end product.

It is suggested that the reviewer read the verbatim transcripts of testimony of the ACCUSED, pages M-1-M-160 (Volume XIII); the two psychiatrists, DR SADOFF, pages 1234-1269 (Volume XI), and LTC BAILEY, pages 1557-1599 (Volume XV); MR POSEY, pages 1297-1342 (Volume XII); and MR IVORY'S testi-

mony reference STOKELY, pages 1508-1556 (Volume XIV).

The chronology of the hearing was as follows:

15 May 70—

Hearing held, delay granted until 1 June 70; further delays granted to defense until 6 Jul 70.

6 Jul-24 Jul 70—

Hearings held. Government completed case; defense granted delay until 10 Aug. 70.

10 Aug-15 Aug 70—

Hearings held.

15 Aug-8 Sep 70—

Delay for mental hygiene evaluation of ACCUSED at Walter Reed General Hospital, Washington, D.C.

8 Sep-11 Sep 70—

Hearings held.

12 Sep-13 Oct 70—

Preparation of Report of Article 32 Proceedings.

III

RECOMMENDATIONS

In the interest of military justice and discipline, it is recommended that:

1. All charges and specifications against CAPTAIN JEFFREY R. MACDONALD be dismissed because the matters set forth in all charges and specifications are not true. There are no lesser charges and/or specifications which are appropriate.

2. That appropriate civilian authorities be requested to investigate the alibi of HELENA STOKELY, Fayetteville, North Carolina, reference her activities and whereabouts during the early morning hours of 17 February 1970, based on evidence presented during the hearing.

IV

REASONS FOR RECOMMENDATIONS

A. Rationale for Recommendation Number One.

(General) The rationale for recommendation number one is based on two major lines of inquiry; first an analysis of the sworn testimony of the ACCUSED and evidence to support his version of the events on the night of 16-17 February and, secondly, an analysis of the government's evidence to refute his statements and testimony. A careful examination was made of the government's charges and its theory of how the crimes were committed as enunciated in the closing argument.

B. Analysis of the ACCUSED's Case.

In summary the ACCUSED states that four (or possibly more) unidentified assailants attacked him when he awoke on the couch in the living room of his apartment to the sounds of screaming by his wife (COLETTE) and cries for help from both COLETTE and the oldest daughter (KIMBERLY). During a short lived struggle with the assailants he received numerous blows, the most significant being a hit on the head and a hard punch (knife wound) to the chest. He fell into the hallway and apparently was unconscious for an unknown period of time. Upon regaining consciousness he attempted, on several occasions, to resuscitate the members of his family and telephoned for assistance.

C. The following is a list of evidentiary factors supportive of the ACCUSED:

(1) The ACCUSED was subjected to two separate psychiatric evaluations: the first sponsored by counsel for the accused and the second, at the request of the Investigating Officer, by a team of three Army psychiatrists at Walter Reed General Hospital. Although there is a four month time span between the two evaluations, there is striking similarity in the conclusions. Basically they be-

lieve he is now sane and was sane on 16-17 February and is experiencing a normal reactive depression following the events. Both feel that the ACCUSED was not trying to hide any facts from then and, had he been, they would have been able to detect it. They were favorably impressed that he could not remember all details and that he freely admitted this fact.

The psychiatrists also state that it is unusual to be asked, as the Investigating Officer did, if an accused is "capable" of committing a certain act. The only major area of disagreement arose in answering this question. The ACCUSED's psychiatrist, who specializes in forensic psychiatry, stated the ACCUSED was not capable of committing the crimes and would have become psychotic if he had; the Army psychiatrists did not think this question could be answered by a psychiatrist.

(2) A significantly large number of character witnesses testified in behalf of the ACCUSED. The testimony covers a life span from age 12, through high school, college, medical school, internship and military service. They testify to his qualities in what can best be described as "The ALL American Boy". In those instances where it was appropriate to comment upon his marital and family relationships it was in terms of a loving husband and father.

(3) The ACCUSED, prior to the time he was formally charged with the murders, was willing to answer questions freely. On 17, 18 and 19 February he gave interviews to FBI and CID agents and on 6 April he answered questions in two lengthy sessions with three CID agents. Finally, he provided sworn testimony at the hearing itself which was subjected to extensive cross examination by the government.

(4) Five of the six doctors who testified stated that the ACCUSED could not predict the medical consequences of the stab wound in his chest if it was self-inflicted. The ACCUSED sustained a 40% pneumothorax (partial lung collapse). All agreed that the location of the wound was such that other vital organs could have been damaged with a greater life threatening potential.

(5) The ACCUSED's statements, from 17 February to his sworn Article 32 testimony, relative to the events of 16-17 February have been substantially the same in all important aspects. Explanation for any discrepancies are logical based on the testimony of the psychiatric experts, the time factor, his natural attempt to forget the horrible sights of 17 February, normal human failure to remember routine actions and the confusion following the blow to his head.

(6) There is, generally speaking, a logical explanation for the location of blood types where found.

(7) After listening to the lengthy testimony of the ACCUSED in the hearing room and closely observing his actions and manner of answering questions it is the opinion of the Investigating Officer that he was telling the truth.

(8) Medical laboratory tests conducted on specimens from COLETTE MACDONALD and the ACCUSED revealed no use of narcotics or habit forming drugs nor was either individual intoxicated on 16-17 February 1970.

(9) There is conflicting evidence as to the degree the crime scene was preserved from the time the first MP arrived on the scene and until photographs were taken some minutes later. The controversy specifically relates to the fact of whether or not the white towel and blue pajama top were on COLETTE's body when first seen by the MPs, the location of the handset of the telephone in the EAST bedroom, the relocation of the white flower pot holder in the living room by some unknown individual and the number (12 to 14) of military police, CID agents, and medical personnel initially in the apartment and their movements through the rooms with the chance of inadvertantly altering the crime scene.

(10) A significant number of fingerprints taken from the apartment remain unidentified.

(11) Only one of the four weapons alleged to have been used in the commission of the crime (a stick/club) can be identified as coming from the ACCUSED's residence.

(12) During the course of the hearing CID Agents IVORY and SHAW testified that they had kicked, pushed

and/or knocked over the coffee table in the living room and it did not come to rest on its edge. On the Investigating Officer's second visit to the MACDONALD apartment he knocked over the coffee table in the living room. The table struck the adjacent chair and landed on its edge.

(13) Considering all known facts about the life and previous history of the ACCUSED up to and including 17 February no logical motive was established for the ACCUSED to have committed such brutal murders, either singly or in any combination.

(14) Because of the manner in which the victims were murdered it is reasonable to conclude that the crimes were committed by persons who were either insane or under the influence of drugs or narcotics. The ACCUSED testified to treating addicts in the emergency rooms of Womack Army Hospital and in two local civilian hospitals. Witnesses testified that the unit chaplain said, at a drug lecture, that a doctor-patient conversation is not privileged. Following this lecture there was a noticeable drop in the number of soldiers seeking appointments with the ACCUSED in his capacity as medical drug counselor and he was reportedly considered a fink".

(15) A flowered jewelry box located on COLETTE's dresser in the EAST bedroom had reddish brown stains inside and one latent fingerprint and one latent palmprint, both unidentified. Apparently two of the several rings requested by the ACCUSED have not been located and it is possible that assailants searched this box for valuables.

(16) Wax from a multi-colored candle not from the ACCUSED's residence was found on the bed spread and a chair in the SOUTH bedroom and also on the coffee table in the living room. This wax could be from a candle used by the female assailant.

(17) The autopsy report on the body of COLETTE shows that blond hair was found in her right hand. MAJ GAMMEL, the pathologist who conducted the autopsy, testified that this hair was four to five inches in length. To date this hair has not been identified.

(18) One witness (POSEY) observed a girl (STOKELY) coming home in a car with at least two males during

the early morning hours (0345-0430) on 17 February in the Haymount section of Fayetteville, North Carolina. He described her as a "hippie" type who frequently wore attire similar to the ACCUSED's description of the female assailant. The girl told POSEY she was "stoned" and had no alibi for her whereabouts that night. She was subsequently interviewed by CID Agent IVORY and he obtained the same information.

POSEY, a reluctant witness, testified on 13 August. He had never previously provided this information to police authorities stating he was fearful of the possible consequences from members of the hippie community.

D. Analysis of the Government's Case.

The government's theory of the events is that the ACCUSED and his wife had an argument in the EAST bedroom concerning the baby's (KRISTEN) wetting of their bed. The argument escalated into a fight. COLETTE and a knife and stabbed him. He obtained a club and beat her and, with each stroke, became angrier and lost ". . . all control in a blind fantastic mindless rage. . . ." KIMBERLY came into her parents' room and he smashed her skull and then placed her in her own bed.

The ACCUSED then regained his senses and, realizing he needed a cover story, decided to blame the murders on hippies. He next went to KRISTEN's room and killed her. His wife, still alive, came into KRISTEN's room. He hit COLETTE again, dragged her back into the EAST bedroom and stabbed her. He then returned to KRISTEN's room, turned her over and stabbed her some more. Finally the ACCUSED hit and stabbed himself and telephoned for assistance.

The government's case against the ACCUSED is based principally upon the fact that there are certain questions raised for which the ACCUSED does not seem to have pat answers, belief that the scene in the living room is staged, that there is no real evidence of the presence of unidentified assailants, that three members of the family were murdered in a bizarre manner yet the ACCUSED remains alive and that the ACCUSED is lying.

E. The following is a list of evidentiary factors presented by the government with my analyses in parentheses.

(1) CID Agent IVORY testified that when COLETTE's body was removed he collected a blue thread on the rug where her head had rested, 20 to 25 blue fibers from the floor and rug of the EAST bedroom, three from the SOUTH bedroom, two from the NORTH bedroom (one of these was under KRISTEN's fingernail), one in the hallway and none in the living room. IVORY also stated that a pajama pocket from the ACCUSED's pajama top was found at COLETTE's feet.

CPT NEAL, the Army doctor who examined the deceased at the apartment, states that he turned over COLETTE's body to examine her. CID Agents IVORY and SHAW stated he did not move the body.

The government believes these blue threads/fibers came from the pajama top of the ACCUSED. The government also contends that the absence of fibers in the living room, where the ACCUSED states a short struggle occurred, and the profusion of fibers in the EAST bedroom where the government thinks the husband-wife struggle occurred, indicates that no struggle occurred in the living room and the scene was staged by the ACCUSED.

The ACCUSED stated that during his struggle with the assailants his pajama top, in some unknown manner, got twisted around his wrists. When he regained consciousness in the hallway he was face down with his hands under his abdomen and still entwined in the pajama top. He took off the pajama top and dropped it in the EAST bedroom. COLETTE's body was leaning against the green chair and he laid her out on the floor. Later, after checking her, he picked up the pajama top and spread it out over her chest area.

(The CID Laboratory report, concurred in by the testimony of a textile expert, qualifies the association of the fibers/threads to this garment by stating they "could have" come from the pajama top and therefore no positive identification could be made.

It is unknown when the pajama top was torn or when the pocket was ripped off the garment. It seems more

logical for this action to have occurred in the couch area of the living room. With the garment wrapped around the ACCUSED's arms, the fibers and pocket may have, in some manner, remained with the garment until it was dropped in the EAST bedroom or when it was opened up to be spread across the chest of COLETTE.)

(2) The ACCUSED states he used telephones in the EAST bedroom and in the kitchen and also pulled a paring knife from COLETTE's chest and discarded it in the bedroom. Witnesses described how one MP also picked up the telephone in the EAST bedroom using three fingers. The CID fingerprint technician testified that there were no fingerprints on these three objects, but smudges on the knife and telephone in the EAST bedroom. The government contends that it is strange that the kitchen telephone and the knife are devoid of fingerprints and theorize that the ACCUSED may have been wearing gloves.

(It seems logical that fingerprints would be on these three items. However, since only smudges appear on the telephone used by the MP it indicates that prints are not necessarily left on an object when used. In addition the ACCUSED thinks he washed his hands in the kitchen and this could have occurred prior to use of the telephone in that room thus further reducing the possibility of prints on that instrument.)

(3) Four pieces of evidence, suspected to be from a surgical glove(s) and bearing blood, were found in the EAST bedroom. One pice which was ¾ of a finger was in the bedding on the floor at the foot of the bed. The ACCUSED states one or more used pair of surgical gloves were on the kitchen sink (not present when the CID arrived) and usually a pair was on top of the dryer in the utility room for the use of COLETTE (also not present).

(The government's theory is that, in the latter stages of the crime, the ACCUSED donned the surgical gloves from the kitchen. The evidence as presented during the hearing does not support that theory.)

(4) The CID lab technician collected red brown stains from the west end of the hall floor which were later identified as Type "B" or Type "O" blood. The ACCUSED testified that he fell, face down, and was unconscious in

this general location with his arms under him and the pajama top entwined around his arms. The government contends that, if the stains are Type "B" blood and the ACCUSED's testimony is true, there should be a pool of blood in this location.

(From the Lab report and testimony regarding the stains it is not evident what quality of blood was at this location. In addition, several witneses testified that at least twelve military personnel were in the apartment and passed to and from through the hallway thus potentially disturbing the evidence. That blood present could have come from the chest wound with the pajama top absorbing blood from the abdominal wound.)

(5) CID Lab reports indicate that Type "O" blood (described by the government as a speck on the lens) was on the spectacles of the ACCUSED which were found on the floor in the living room. Also, that Type "AB" blood was on the top edge of an ESQUIRE magazine which was located under the edge of the overturned coffee table in the living room. KRISTEN had Type "O" blood and KIMBERLY had Type "AB" blood. The government contends that the ACCUSED wore his spectacles while committing the crimes.

(Considering the amount of blood evident in the killings of the two girls it is entirely plausible to consider that some of it contaminated the clothing of the assailants and their weapons and was subsequently transferred to the two above mentioned objects.)

(6) The family of the ACCUSED was brutally murdered while the ACCUSED suffered what the government describes as "superficial injuries". The government does not think that unknown assailants commiting such a crime would leave the ACCUSED alive.

(Although this is not evidence in the true sense of the word it is a factor to consider. Moreover, it seems logical that the assailants would be surprised to find the ACCUSED sleeping in the living room. The ACCUSED testified they hit him with a club and repeatedly with a sharp instrument. In the dark and in the absence of an inspection of the ACCUSED's body they could assume the

assault was as effective on him as on the other members of the family. When the ACCUSED fell into the hallway the assailants, by this time, were probably anxious to leave the premises and departed in haste.)

(7) Although not specifically stated by the government in the closing argument of the hearing, there is the implied lack of real evidence of the presence of assailants from outside the MACDONALD household.

(Evidence and/or unanswered questions leading to the possible conclusion that assailants were present as described by the ACCUSED is as follows: Numerous unidentified fingerprints on the premises; wax from an unknown candle apparently not from the MACDONALD household; unidentified blond hair in the right hand of COLETTE; red brown stains on the interior of a jewelry box in the EAST bedroom together with an unidentified finger and palm print; and, no evidence that the two knives and the ice pick, apparently used in the murders, came from the apartment.)

F. Rationale for Recommendation Number Two.

The rationale for recommendation number two is based on testimony presented at the hearing by a civilian witness POSEY which had never previously been presented to civilian police and/or military investigative authorities. There was a remarkable similarity of part of his testimony to testimony by the ACCUSED and other evidence.

As a result of this information the Investigating Officer requested that the government attempt to get a civilian female (STOKELY) whom POSEY had seen during the early morning hours of 17 February, to appear as a witness at this hearing. CID Agent IVORY testified that he subsequently interviewed her twice, that she had no alibi for that morning because she stated she had been on marihuana, and that she declined to testify.

It seems appropriate to pursue this line of inquiry further and to provide the testimony of POSEY and IVORY to appropriate local civilian authorities with a request that they determine if STOKELY and/or her companions of that evening can be placed at the scene of the crime.

V

SUMMARIZED TESTIMONY

A. GOVERNMENT

MISS CAROLYN LANDEN, Chief Group Operator with the Carolina Telephone Company, Fayetteville, North Carolina, testified that at approximately 0340 hours, 17 February 1970, she was notified by another operator that an unusual call was on her line. She heard the customer say, in a weak voice, ". . . 544 Castle Drive . . . that he had been stabbed . . ." (p6). She promptly notified the MPs by connecting the call with their line. After approximately 15 minutes elapsed, she ". . . could hear moving around in the background . . ." (p 12), from which sounds she concluded the MPs had arrived at 544 Castle Drive. (pps 5-14)

1LT JOSEPH L. PAULK, MP Duty Officer on 17 February 1970, testified that on the night in question, his desk sergeant received a telephone call. PAULK was summoned by him and in response to his statement that there was trouble at 544 Castle Drive, he and his driver proceeded there.

Upon checking the front door, he discovered it was locked so he sent MPs around back to check the rear entrance. As PAULK started towards his vehicle, one of the MPs shouted, ". . . they are around here. . . ." (p 27).

PAULK then entered the EAST bedroom and discovered, in addition to MPs MICA and TEVERE, COLETTE MACDONALD lying on her back on the floor, apparently dead, and the ACCUSED, lying beside his wife. MICA was assisting the ACCUSED. PAULK observed that the ACCUSED had some of the symptoms of shock and his speech was rather incoherent.

In PAULK's opinion, the ACCUSED expressed more concern about the condition of his wife and children than did he about his own condition. The ACCUSED repeatedly asked about the condition of his children and once stated, ". . . Oh, Jesus Christ, look at my wife. . . ." (p 34).

Prior to leaving the EAST bedroom, PAULK took note of the word "PIG" written in blood on the headboard of the bed. He also noticed a wet spot in the center of the bed.

Upon departing the EAST bedroom, he started down the hallway. He looked into the doorways of the NORTH and SOUTH bedrooms and assumed the children were dead because there was ". . . just absolutely no movement whatsoever. . . ." (p 104). Continuing down the hallway, PAULK entered the living room at which time he noted the dim lighting. After quickly looking into the kitchen and dining room, he began to take notes.

Thereafter, it was reported to him that the ACCUSED described his assailants as three (3) males (one Negro) and one female. PAULK caused this information to be put on the radio. At about this time PAULK also cautioned all MPs in the house not to move or touch anything, an instruction PAULK subsequently repeated several times. He saw grass on the carpet after MPs had entered the house and he ". . . halfway remembers a medic . . . not in uniform. . . ." (p 57).

PAULK used the phone next door in the CW3 KALIN apartment to notify COLONEL KRIMANEK (Post Provost Marshal) of the crime and PAULK also telephoned to MP desk sergeant (BOULWARE) to give him a description of the assailants and to request the desk to expedite the ambulances and CID.

PAULK was in the EAST bedroom more than three times, during one of these, he observed SGT TEVERE attempt to use the telephone. PAULK testified TEVERE picked up the receiver by using his index finger and thumb, thereafter replacing the handset on the cradle and subsequently placing the handset in a dangling position.

In addition PAULK heard the ACCUSED say, ". . . I'm going to kill those God damn acid heads. . . ." and ". . . I'm not going to help them any more. . . ." (p 95). (pps 15-113).

SP4 KENNETH C. MICA, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified that in the early morning hours of 17 February 1970, he was routinely patrolling the Corregidor Courts/Anzio Acres housing area with SP4 MORRIS. It was a rainy cold night. During this period he passed by the 544 Castle Drive area several times and did not notice anything unusual. Approximately 0345 hours his patrol received a radio call to proceed to 544 Castle Drive. Upon arriving he discovered three MP vehicles were already there.

After a futile attempt to gain entrance through the front door, SGT TEVERE came from the rear of the quarters and yelled, ". . . Tell them to get Womack ASAP. . . ." (p 116). When TEVERE and MICA entered the EAST bedroom through the rear door, MICA stated he observed COLETTE lying on her back and the ACCUSED lying on his stomach on top COLETTE's left shoulder. MICA testified that he observed COLETTE's midriff and a portion of her left breast she was not covered by a pajama top or white towel.

MICA turned the ACCUSED over and he said ". . . Check my kids. How are my kids. . . ." (p 117). MICA immediately ran down the hallway, glancing in both children's bedrooms and observed the children with his flashlight. Both children appeared dead. At the end of the hallway MICA briefly glanced into the living room—dining room area. Among the things he noticed was the overturned coffee table which was resting on its edge.

After returning to the ACCUSED in the East bedroom, MICA then remained with him until the medics arrived. During this period MICA administered mouth to mouth resuscitation at least three times because the ACCUSED would lose consciousness. At times the ACCUSED's teeth were chattering.

Among the statements MICA recalled the ACCUSED saying are, "I can't breathe, I need a chest tube. . . ."; ". . . how are my kids. Check my wife. . . .", "I heard my kids crying. I tried to feel my wife's pulse and I couldn't find it. . . ."; ". . . they kept saying acid is groovy, kill the pigs. Why did they do this to me. . . ." (pps 120-121).

MICA asked the ACCUSED what happened. The ACCUSED answered that there were four of them, one blond female with a big floppy hat and that she had a candle. She kept saying ". . . acid is groovy, kill the pigs. hit them again. . . ." The ACCUSED said there were ". . . three men and one woman, one Negro. I think I hit them. I think I scratched them. . . ." (p 142).

As MICA received this information, he repeated it and believed that PAULK was copying it down.

During the time MICA was attempting to administer first aid to the ACCUSED, the ACCUSED tried to struggle up from the floor to go check his children himself. MICA was then forced to restrain him. The ACCUSED repeatedly insisted that MICA leave him alone and attend to the children. MICA testified that the ACCUSED, when he was being taken from the house on a stretcher, struggled to get up and said, ". . . God damn MPs, let me see my kids. . . ." (p 147).

While in the EAST bedroom MICA recalls the ACCUSED describing some details of the attack upon him. Included therein were statements that he (ACCUSED) had been sleeping on the living room couch when he was awakened by the screams, that upon awakening the ACCUSED saw his assailants standing at the edge of the couch and that before he could get up they started hitting him while the woman was chanting.

MICA testified that at the time the accused was removed from the premises there were approximately 12-13 persons inside the apartment who were either MPs or medics. At this time MICA observed that the flower pot in the living room, which had apparently been sitting on the coffee table and had been thrown to the floor, was lying on its side on the floor, its contents spilled out. One of the persons in the living room, whom MICA believed was an ambulance driver, appeared to pick up the flower pot and set it on its base following which he sat on the couch. He was ordered to move and did so promptly.

MICA also testified that the MPs had been instructed by radio that as soon as someone got inside the house they were to pick up the phone and let the MP desk know what

the situation was. MICA observed TEVERE pick up the receiver and he believes TEVERE stated the line was dead. MICA stated that when he first observed the telephone, ". . . It was off the cradle and I believe it was laying on the dresser next to the phone. . . ." (p 162). (pps 115-165)

SGT RICHARD D. TEVERE, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was on MP patrol on 17 February 1970 when, at approximately 0350 hours, he was dispatched by radio to 544 Castle Drive. He was the first MP to enter the rear door and observe the victims in the EAST bedroom. After calling for assistance, he returned to the same bedroom, at which time he heard the ACCUSED ask him to check his children and the pulse in his wife's leg. In response to this, TEVERE next went two steps inside the SOUTH bedroom, shined his flashlight and saw a child that appeared to have been stabbed several times. Going from there to the doorway of the NORTH bedroom, he repeated this procedure and observed both a child that appeared to have been beaten and stabbed and a big puddle of blood on the floor.

Upon returning to the EAST bedroom, PAULK (MP duty officer) asked TEVERE how "bad" the children were and TEVERE responded they appeared to be "bad". TEVERE assumed they were dead. (p 189). While he was in the EAST bedroom on this occasion TEVERE picked up the telephone receiver (which was off the hook) with his thumb and two fingers in order to call the Provost Marshal's office. His attempt was futile, as TEVERE observed, ". . . It was dead. There was no dial tone. . . ." (pps 192-193). TEVERE stated he then ". . . placed the phone (receiver) right back where I got it from . . . along side the telephone. . . ." (p 193).

TEVERE testified that the ACCUSED described his assailants as two male Caucasians, one male Negro wearing a field jacket with sergeant stripes on it, one female with long blond hair wearing muddy boots, a floppy hat,

carrying a candle, saying acid is groovy and kill the pigs (p 211).

When he first observed COLETTE, TEVERE stated he noticed her left breast and midsection and does not recall seeing a blue pajama top (ACCUSED's) or white towel on her body.

Subsequently TEVERE went into the living room where he did not observe any wet spots or mud. TEVERE stated he was looking for mud because the ACCUSED had reported seeing a ". . . blond (woman) with . . . muddy boots. . . ." (p 201). In the living room, TEVERE noticed a white flower pot ". . . lying on its side . . ." on the floor (p 203). In the kitchen, which was lighted, he saw the telephone receiver dangling on the floor.

TEVERE agreed that there was a total of about a dozen MPs, CID or medics in the apartment during the approximate 15 minute period he was there. (pps 184-219).

SGT ROBERT J. DUFFY, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified that, as a result of a radio call, his patrol proceeded to 544 Castle Drive where he noticed two MP vehicles already had arrived.

DUFFY entered through the utility room and pushed past MICA who was standing in the doorway to the EAST bedroom. DUFFY stated he observed COLETTE lying on her back and the ACCUSED lying parallel to her on his side with his arms across her chest and his head on her shoulder. He observed the white towel over COLETTE's body but he does not remember seing any mud, water spots or debris on the floor of the EAST bedroom, despite the fact the room was brightly lighted.

When DUFFY heard the ACCUSED request that his children be checked, DUFFY proceed to the NORTH bedroom. After going in two or three feet, he saw KRISTEN bleeding from the neck and shoulder. Simultaneously DUFFY observed DICKERSON going towards the SOUTH bedroom. As DUFFY exited the NORTH bed-

room, DICKERSON stated there was a baby (KIMBERLY) that seemed to be dead in the SOUTH bedroom. DUFFY then ran out of the house to the utility room to call for medical assistance.

At approximately 0430 hours, DUFFY and MP (SP4) JACKSON were given instructions ". . . to walk around the house to see if we could find any bits of evidence. . . ." (p 256). JACKSON discovered an ice pick under a bush near the northeast end of the house and DUFFY observed it when JACKSON called his attention to it. DUFFY stated neither he nor JACKSON touched the item, rather, JACKSON left to inform higher authorities of his discovery. After JACKSON's departure, DUFFY continued the search and discovered a stick (club) (Exhibit G-79) outside the rear step of the back entrance to the utility room.

Among his observations, DUFFY remembers seeing two people (ambulance drivers or attendants) from Womack Army Hospital, and one was wearing a fatigue jacket, dungarees and boots. In addition, DUFFY is of the opinion that one or more drawers of the bureau on the south wall of the EAST bedroom were open at the time he entered the room. DUFFY stated, ". . . I noticed like the drawers, like stuff hanging out of the drawers, and as if someone had looked through them. . . . (P 251). DUFFY was shown Exhibit A-18 which shows the drawers closed and DUFFY stated this is not how he observed them upon his initial entry. (pps 220-284)

SP4 DENNIS MORRIS, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was on MP patrol in the early morning hours of 17 February 1970 and that it was a rainy cold night. He was patrolling the Corregidor Court/Anzio Acres housing areas when he received a radio communication to proceed to 544 Castle Drive. Upon going around the house to the back door with TEVERE, MORRIS saw the two bodies on the floor of the EAST bedroom. TEVERE immediately

summoned assistance and returned with SP4 MICA. 1LT PAULK and possibly the duty officer's driver (DICKERSON). MORRIS then followed the others into the house.

Upon entering the EAST bedroom, MORRIS saw MICA assisting the ACCUSED, MORRIS testified the blue pajama top was on COLETTE's body at this time (as represented in Exhibit A-6), but MORRIS does not remember seeing the white towel.

MORRIS then proceeded down the hallway, but stopped at the end and at the top of the steps. He testified that Exhibit A-9 represented what he saw. In particular, he remembers the white flower pot standing up. At this time MORRIS stated there were four or five MPs in the living room.

Next he returned to the EAST bedroom and was instructed to guard the rear entrance. Initially he did so from inside the utility room for approximately 15 minutes. Thereafter he moved to the outside rear porch and after about 20 minutes he noticed a stick lying on the ground which he thought might have some relevance. After about another hour had passed and it was becoming light, MORRIS stated he saw an ice pick and knife under a bush. When he pointed this out to CID agent he was told not to let anyone disturb these objects. Later, MORRIS observed the knife and ice pick being photographed and boxes being placed over them for protection from the rain. A half an hour later, these items were placed in plastic bags and removed. Small marking sticks were also placed at the site of the club before it was removed (see Exhibit A-20). (pps 289-319)

CW3 DONALD L. KALIN, 573d Personnel Service Company, Fort Bragg, North Carolina, testified that on 17 February 1970, he and his family resided at 542 Castle Drive, which is the adjoining apartment to the ACCUSED. After the ACCUSED and his family moved into the apartment in August or September 1969, KALIN had occasion to visit the ACCUSED's home about four times socially and the ACCUSED visited their home one

time. From August of September 1969, when the MACDONALDS moved into 544 Castle Drive, until February 1970, KALIN never saw the parents argue; in fact, they apparently had a good relationship. KALIN never observed the ACCUSED attempt to harm his children. The ACCUSED told KALIN he was purchasing a pony for his children at Christmas to surprise them.

On 16 February 1970 KALIN went to bed at approximately 2200 or 2230 hours. KALIN's bedroom is over his own living room, however, he also has two bedrooms upstairs which are directly over the ACCUSED's living room —dining room—kitchen area. KALIN heard no unusual noises until he was awakened on the 17th of February by MPs on the ACCUSED's front door. Approximately 45 minutes later CID agents requested him to identify the three victims which he did. (pps 320-330)

CPT WILLIAM P. NEAL, Womack Army Hospital, Fort Bragg, North Carolina, testified he is a physician who was the professional officer of the day at Womack Army Hospital on the night of 16-17 February 1970. He received a call to go to 544 Castle Drive to pronounce bodies dead. NEAL was at the home from approximately 0445 to 0520 hours on 17 February.

When he arrived, he was met at the front door and requested not to disturb evidence. Thereafter he was escorted through the house by a CID agent. Before entering each bedroom, NEAL was requested to await before checking vital life signs until a photographer finished taking pictures of the bodies.

NEAL first visited the NORTH bedroom (KRISTEN's) and stated that Exhibit A-11 represents the scene as he saw it. He pronounced her dead, apparently from stab wounds.

Next NEAL went to the EAST bedroom (COLETTE's) and he stated that Exhibit A-17 represents the scene as he saw it. She was pronounced dead apparently from multiple stab wounds. During his examination, NEAL

removed the blue pajama top from COLETTE's chest. NEAL also had to roll COLETTE over on her side to check her for back wounds.

Lastly, NEAL went into the SOUTH bedroom (KIMBERLY's) and he stated that A-23 represents the scene as he saw it. After examining her, NEAL pronounced her dead apparently from heavy blow to the head although there were stab wounds. (pps 331-353)

MAJ WILLIAM H. STRAUB, Womack Army Hospital, Fort Bragg, North Carolina, testified he was one of the physicians on duty on the morning of 17 February 1970 at the emergency room of Womack. When the ACCUSED was wheeled into the emergency room, STRAUB quickly (2-3 minutes) examined him, noting that the ACCUSED's blood pressure had already been taken and that a vaseline gauze bandage had been applied to his chest wound. Thinking the ACCUSED might have a collapsed lung because of decreased breath sounds, STRAUB sent the ACCUSED to x-ray. After seeing the initial x-ray film, STRAUB concluded the ACCUSED had a 20% collapse of his right lung. Subsequently, 40%)

STRAUB noted a laceration of the ACCUSED's abdomen but considered that not too serious since it had not entered the peritoneal cavity; therefore, STRAUB gave primary emphasis to the chest wound. STRAUB stated that, ". . . If you puncture a lung you don't know whether you are going to get a 10% collapse or a 100% collapse. . . ." (P 363), and that he considered the ACCUSED's partially collapsed lung to be a serious injury. (pps 355-364)

SP6 MICHAEL D. NEWMAN, Medical Company, Womack Army Hospital, Fort Bragg, North Carolina, testified he was the NCOIC of the emergency room on the night of 16-17 February 1970. When the ACCUSED was brought in by ambulance between 0415 and 0430 hours, NEWMAN examined the ACCUSED's wounds and cleaned up the blood on his body. In addition NEWMAN, in a

sworn statement given on 25 February 1970, stated he placed a vaseline gauze pad over the chest wound (Exhibit G-11).

Although the ACCUSED was excited and talking when he came into the emergency room NEWMAN thought his general condition was ". . . very good. . . ." (p 365). Furthermore NEWMAN did not believe the ACCUSED was in shock. During this initial period, the ACCUSED was being questioned by a nurse who was seeking administrative information and by a CID agent part of the time. The ACCUSED asked about his wife and children and described to NEWMAN what he remembered of the attack on him. The ACCUSED also gave a description of the assailants in which he said they were four persons, two of whom were male Negroes.

According to NEWMAN, the ACCUSED was in the emergency room between 20 and 30 minutes, was taken to x-ray, returned to emergency and then taken by NEWMAN to Ward 2-B.

NEWMAN observed that the ACCUSED's blue pajamas bottoms were torn in the crotch and had some blood on them. Ultimately, the bottoms were discarded by an unknown person in accordance with emergency room SOP. (pps 364-376)

MR. DILLARD O. BROWNING, forensic chemist, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he performed the chemical analysis on fibers, hairs, paints, waxes and wood chips in the MACDONALD case. Upon being shown Exhibits G-7 and G-8, he stated that these two reports contained, in part, the results of his work. BROWNING further described the various scientific procedures used in arriving at the conclusions contained in the Lab Reports.

BROWNING noted that the hair brush which can be seen in Exhibit A-24 (this brush is referred to as Lab Exhibit D-35 on page 2 of the Lab Report (Exhibit G-7)), contained only one hair, dark, apparently dyed, which he judges to be from a female because of its length and waves.

Included in the Lab Report (Exhibit G-7) are several test results listed on pages 14 (fibers, hair, wood splinters and paint) and 15 (wax) which were elaborated upon by BROWNING as follows:

1. Reference fibers: paragraph 27 indicates fibers ". . . could have . . ." originated from the blue pajama top of the ACCUSED (Lab Exhibit D-210).
2. Reference hair: paragraphs 29, 31 and 33 indicate hair ". . . could have . . ." originated from the head of the respective victims. In testimony, BROWNING noted that the known hair samples of KRISTEN came from her head at the time of the autopsy, but that the known hair samples (used for comparison purposes) of COLETTE and KIMBERLY came from outer wear garments in the house. BROWNING stated this latter technique is used in cases of missing persons.
3. Reference wood splinters: paragraph 35 indicates wooden splinters ". . . could have . . ." come from Lab Exhibit A (wooden stick, 31" in length, sometimes described by witnesses as a club).
4. Reference paint: paragraph 37 indicates paint from Lab Exhibit A (wooden stick), ". . . could have a common source of origin . . ." such as the paint found on Lab Exhibit E-203 (paint from sidewalk behind ACCUSED's house).
5. Reference wax: paragraph 32 indicates that waxes found on the bed spread and chair in the SOUTH bedroom and on the coffee table in the living room were ". . . diffeernt . . ." in chemical composition to wax from candles found in the MACDONALD home. BROWNING testified he had received six additional candles (from the MACDONALD house), one multi-colored but as of yet had not done the chemical analysis. (No Lab Report had been received on these samples at the time the hearing closed.) (pps 393-434)

MISS PAMELA KALIN, 542 Castle Drive, Fort Bragg, North Carolina, testified she is a student and the daughter of CW3 DONALD KALIN, who testified earlier. Her

bedroom is located directly over the MACDONALD livinig room and she was asleep there on the night of 16-17 February 1970. Prior to the 17th of February, she often baby sat for the MACDONALDS. She considered the MACDONALD children to be normal and were not abused by the parents, whom she believed were a normal happy married couple. When in her bedroom, she could ". . . hear conversations being carried on in a normal tone in the living room below . . . if its quiet . . ." (p 458). She had been awakened on other occasions when the MACDONALDs had company.

On the night of 16 February she went to bed about 2230 hours but was later awakened by what she believes ". . . was CPT MACDONALD and he was either sort of laughing or a sobbing cry . . ." (p 458). She agreed with the defense description of the intensity or sound level as being somewhere between a scream and a normal conversation. She stated she heard no evidence of a scuffle, furniture being moved or screaming.

She dropped back off to sleep and was next awakened by MPs banging on the door of the MACDONALD residence. (pps 457-463)

SP4 CRAIG S. CHAMBERLAIN, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he works at the Lab as a chemist and specifically was one of the chemists who worked on blood stains in the MACDONALD case. In addition, he was a member of the Lab Team sent to Fort Bragg to assist in the collection of evidence. This lasted approximately five days beginning at noon, 17 February 1970.

CHAMBERLAIN described the methods employed in obtaining evidence and the scientific techniques used in the typing of blood exhibits. He stated that blood tests were conducted to determine first if the sample was blood; next, if the blood was human blood; and, finally, the type of human blood. Two different experiments (crust and absorbtion elution) were used in determining blood type. CHAMBERLAIN explained that when the Lab Report (Exhibit G-7) states that ". . . red-brown stains . . .

revealed the presence of human blood . . . Type 0 . . .", as in paragraph 4, page 12, this means *all* tests have been conducted and the results are 100% accurate. On the other hand, paragraph 13, page 12, uses the word ". . . indicated . . . Type AB . . .", which means either the crust *or* the absorbtion elution tests were used; therefore, the blood typing is in excess of 90% accurate. From dried blood, chemists can only determine the basic International Blood Group Types (AB, A, B or 0). They cannot determine such factors as RH positive or negative, etc.

In order to make his testimony more meaningful, CHAMBERLAIN provided copies of his working diagrams showing floor plans of the various rooms in 544 Castle Drive. On the diagram he indicates where the blood was found and the blood types when identified (see Exhibits C-20 through G-25).

His examination of the top sheet from the NORTH bedroom (see Exhibit G-16) revealed that most of the blood was Type A. When shown a photo of the white towel found on COLETTE (see Exhibit G-17), CHAMBERLAIN circled on the photo two locations of AB type blood. (pps 435-456 and 465-495)

MSG HILYARD O NEDLIN, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he is one of the fingerprint-technicians who visited 544 Castle Drive to assist in collecting evidence. He worked on the fingerprints exhibits listed in Exhibits G-7 and G-8 as well as Exhibit C-28, a supplemental Lab Report.

NEDLIN noted that the EAST bedroom phone contained no readable fingerprints, ". . . just smudges and smears. . . ." (p. 500). The telephone in the kitchen also contained no legible fingeprints and NEDLIN thought ". . . that it was rather odd that it was completely stark. . . ." (i.e. devoid of any discolorations, p 501).

There were found on the premises a total of 44 latent fingerprints, 29 latent palm prints and one latent foot print. Of these 21 fingerprints, 6 palm prints and the

footprint were identified, all belonging to either CPT or MRS MACDONALD.

In addition there were 44 fingerprints and 7 palm prints that NEDLIN thought should be capable of being photographed after he viewed them with a magnifying glass. However, apparently because of difficulties in the photography process, they were not useful. Some of these prints were again photographed and were readable for comparison purposes with record prints. (pps 497-537).

MAJ GEORGE E. GAMMEL, Womack Army Hospital, Fort Bragg, North Carolina, testified he is the physician who performed the autopsy on COLETTE on 17 February and supervised autopsies performed by DR. HANCOCK on KRISTEN and KIMBERLY. During the autopsy on COLETTE, GAMMEL supervised the taking of a number of photographs (see Exhibits G-29 through G-32). GAMMEL identified the final autopsy report on COLETTE and it was marked as Exhibit A-25.

GAMMEL observed seven incised (knife) wounds and 21 puncture type (ice pick) stab wounds on COLETTE's chest. Some of these wounds penetrated vital organs (see Exhibit G-29). There were nine knife wounds in her neck with some penetrating the trachea and thyroid which caused much internal bleeding (see Exhibit G-30). Her chest and heart cavities as well as the pericardium were full of enough blood to have caused her to bleed to death.

On COLETTE's head there were six blunt trauma (blows with a blunt instrument). The most significant was the one over her nose which caused a small skull fracture. (See Exhibit G-31). Her arms were bruised and lacerated and both were broken, probably by a blunt instrument. GAMMEL believes they were broken as she was holding both arms up in a protective position. (See Exhibits G-32)

GAMMEL feels that the stab wounds in the chest were fairly perpendicular to the body. He also testified that, as a result of the toxicological work-up on COL-

ETTE, no narcotics or drug abuse type drugs were found in her body. Some hairs (blonde per autopsy report A-25) 4-5″ in length were entwined in the right hand (p 552). COLETTE was four to five months pregnant at time of death. (pps 538-559)

CPT WILLIAM F. HANCOCK, Womack Army Hospital, Fort Bragg, North Carolina, testified he performed autopsies on the bodies of KIMBERLY and then KRISTEN MACDONALD on 17 February under the supervision of GAMMEL. HANCOCK identified Exhibits G-33 and G-35 as being autopsy photographs of KIMBERLY. Exhibit G-33 shows the right side of her face with multiple abrasions to the right ear and cheek and eight to ten stab wounds on her neck which transected the windpipe. Exhibit G-34 shows a severe fracture to her skull and corresponds to other fractures at the base of her skull. Exhibit G-35 shows the left side of her face where multiple fractures inside the skull around and under the eye area can be observed. HANCOCK considered the major wound to be the one to the right side of the head (caused by a blunt instrument); it ". . . was of such severity (as) to cause coma and possibly death shortly thereafter. . . ." (p 564) and was ". . . sustained first. . . ." (P 565). No puncture (ice pick type) wounds were noted on KIMBERLY's body.

HANCOCK next described the wounds sustained by KRISTEN beginning with Exhibit G-37. Four incisional (knife stab) wounds were observed in the left chest area, two of these penetrating deeply and into the right side of the heart. A total of 15 circular puncture (ice pick type) wounds were also noted in her chest area, all of a superficial nature. Exhibit G-38, which is a photo of her back, shows 12 incisional wounds. ". . . These penetrated the left lung cavity, lacerating the lung and . . . penetrated the left heart in two instances. . . ." (p 581). Exhibit G-36 shows several incisional wounds to her right hand; however, HANCOCK testified there were also small incisional wounds to her left hand.

The wounds to KRISTEN's heart sustained from the front and rear were sufficient to cause bleeding to death. The knife wounds were at right or left angles to her body. HANCOCK noted no broken bones or blunt trauma on KRISTEN. (pps 560-584)

MAJ SEVERT H. JACOBSON, Womack Army Hospital, Fort Bragg, North Carolina, testified he was on duty at Womack on the night of 16-17 February as the attending surgeon. JACOBSEN and STRAUB both saw the ACCUSED in the emergency room. JACOBSON described all of the ACCUSED's wounds as superficial except for the chest wound which, upon x-ray, showed a 20% pneumothorax. The ACCUSED was not suffering from shock and he did recall the events that had occurred at his home.

JACOBSON related that the ACCUSED states, among other things, the following: that he was awakened by someone beating on him and he heard his wife screaming; there was a blond haired female holding a candle saying something like "kill the pigs"; there were three males, one a Negro; somebody had a sharp instrument and somebody a club; heard his wife say something to the effect, "Why are they doing this?"; that he examined his children and his wife "looked very bad"; he said, "Be sure to tell the MPs and CID I pulled the knife that was in her chest out"; he mentioned something about an individual named BADGER he had seen as a physician pertinent to drug abuse; and multiple times he asked why his wife and children had not been brought to the hospital. (p 590).

When asked had he been unconscious the ACCUSED could not remember.

JACOBSON saw no evidence of neurological abnormalities and stated the ACCUSED's medical condition was excited, coherent, and alert. His vital signs were stable and, in JACOBSON's opinion, the ACCUSED's medical condition was good to fair.

After consultation with DR. GEMMA later in the morning on 17 February, it was decided to insert a tube (thoracotomy) into the ACCUSED's chest as he then had a 40% pneumothorax.

JACOBSON is of the opinion that a doctor who inflicted a pneumothorax of this nature upon himself would not know what the final medical consequences would be.

JACOBSON indicated that the ACCUSED's chest wound was in the general area of his liver and diaphragm. He agreed with the defense counsel's statements that the other puncture type wounds in the left pectoral region of the ACCUSED's chest ". . . could have touched the lung and the lung could have healed itself. . . ." (p 615) and that, reference head injuries, ". . . there is no medical relation to what the injury looks like on the surface as to what damage it causes to the brain. . . ." (p 616). (pps 586-630)

SP 7 WILLIAM F. IVORY, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was the CID investigator on duty on the night of 16-17 February. At approximately 0350 hours he was awakened by his radio monitoring set at which time he learned of the incident of 544 Castle Drive. IVORY telephoned the duty photographer, gathered his investigative tools and went to the address with the PMI duty investigator HAGAN ROSSI. There was a light rain; it was quite cool and the ground was wet. Upon arriving around 0400 hours, IVORY observed four MP vehicles and an ambulance and about five MPs outside providing security.

IVORY passed through the 2 MPs at the front door and entered the living room. There he observed LT PAULK and four MPs standing by the desk. After IVORY was briefed by PAULK, IVORY requested PAULK to reduce the number of unnecessary personnel in the house. While they talked, IVORY observed the ACCUSED being wheeled (in a litter) through the living room and out of the house. IVORY was then escorted through the apartment at which time he made

mental notes and, by visual inspection, determined the victims were dead. During this tour, IVORY asked PAULK whether anything had been moved and PAULK said no, except for the telephone in the EAST bedroom. Following this initial inspection IVORY went next door to the KALIN residence and called for investigative assistance. While there, IVORY requested KALIN to identify the deceased which he (KALIN) did.

Thereafter, IVORY continued to make additional observations until photographer SQUIRES arrived. Under IVORY's supervision, the entire house was photographed. IVORY identified Exhibits A-5, 6, 7, 8, 9, 10, 11, 15, 17, 18 and 23 as being photographs which depicted the scene as he first saw it upon his arrival at 544 Castle Drive. Exhibit A-24 is a photo of the body outline of COLETTE after her body was removed. Exhibit A-12 depicts the position of KRISTEN's body following the examination by DR. NEAL.

IVORY then identified 32 additional photographs as Exhibits G-41 through G-72. The following photos show the scene in the various rooms as IVORY observed them upon his arrival at the residence. Exhibits G-41 through G-48 depict the EAST bedroom; Exhibits G-62 through G-66 depict the living room; Exhibits G-50 through G-56 depict the NORTH bedroom; Exhibits G-68 through G-71 depict the SOUTH bedroom; Exhibit G-49 depicts the hall bathroom and finally Exhibits G-57 through G-61 depict the kitchen (with Exhibit G-59 showing blood stains). Exhibit G-67 is a photo showing the body outline of KIMBERLY after her body was removed and Exhibit G-72 depicts a view of the utility room with the door closed. (IVORY testified it was open when he first saw it.)

At 0458 hours IVORY began escorting CPT (DR) NEAL as NEAL inspected the victims and pronounced death. NEAL went first to KRISTEN, then to COLETTE and finally to KIMBERLY. NEAL was requested not to move the position of the bodies any more than was absolutely necessary. IVORY stated NEAL did have to move KRISTEN's body. After NEAL pronounced each victim dead, he immediately departed the premises.

IVORY returned to the EAST bedroom and assisted in the careful removal of the white towel (Exhibit G-73) and the blue pajama top (Exhibit G-74) from the body of COLETTE. These items were then placed in plastic evidence bags. Also collected was the pocket to the blue pajama top (Exhibit G-75) which was lying at COLETTE's foot. After these items of evidence were collected, IVORY supervised the ambulance attendants as they removed all bodies from the premises. As COLETTE's body was removed, IVORY looked at that portion of the rug where her head had rested and saw a thread which he also collected as evidence. In addition IVORY collected numerous (20-25) other threads or fibers from the floor and the mat of the rug in the EAST bedroom.

During the period 17 through 21 February while the Fort Gordon Lab technicians were collecting evidence, IVORY testified that he was present. IVORY took a note of a blood stain that was found on the top edge of an Esquire magazine which was resting underneath the overturned coffee table in the living room. IVORY stated that no blue fibers were found in the living room; however, one thread was found in the hallway, three blue fibers in the SOUTH bedroom and two blue fibers in the NORTH bedroom (one of which was under KRISTEN's fingernail).

IVORY described how, over a period of time, and with varying degrees of force, he caused the coffee table in the living room to be overturned. In each case it landed on its top and not on its edge.

IVORY located eight packages of rubber surgical gloves under the kitchen sink. In the EAST bedroom near COLETTE's head he found a rubber substance ". . . like from a . . . clear rubber glove . . ." (p. 675). In the sheet which was lying on the floor at the foot of the bed in the EAST bedroom, IVORY found an entire bloody finger ". . . of a rubber glove such as a surgeon's rubber glove. . . ." (p. 675). No remaining part(s) of the glove was located.

IVORY stated that DR. NEAL did not move COLETTE's body to examine her back, did not remove the blue pajama top to examine her chest and did not use a stethescope during this examination—all of which NEAL testified as having done.

IVORY also testified that the six-drawer chest in the EAST bedroom had no drawers open when he observed it, that the kitchen door was closed and locked, that there was some wet pieces of grass in the living room on the rug and in the EAST bedroom, and that there was a doll's head on the clothing in the west end of the hallway. When handed Exhibits G-45, G-48, G-54 and G-65, IVORY encircled in red what he believed were the blades of grass he observed. PAULK told IVORY the wet grass were tracked in by MPs. (pps 632-778)

MR. ROBERT H. CAVERLY, Special Agent with Federal Bureau of Investigation, Fayetteville, North Carolina, testified he interviewed the ACCUSED at Womack Army Hospital on 17, 18 and 19 February. With him on all three occasions was CID Agent HODGES. CAVERLY took handwritten notes and asked most of the questions. Later these were transcribed, and CAVERLY identified Exhibits G-76, 77 and 78 as being the product of his three interviews.

The First interview on 17 February lasted from 1426 to 1610 hours. The ACCUSED stated he was under sedation; however, he agreed to the interview and appeared to CAVERLY to be alert and responsive, although the ACCUSED did also appear to be emotionally upset and unable to give a coherent narrative. At the one hour interview on 18 February the ACCUSED was coherent and stated he was not under sedation. On 19 February, the interview lasted 45 minutes at which time the ACCUSED was very alert and coherent. (pps. 703-723).

WG1 ROBERT B. SHAW, Criminal Investigator, Fort Bragg, North Carolina, testified he responded to IVORY's request for investigative assistance and arrived at 544 Castle Drive at approximately 0450 hours. Upon entering the premises, SHAW spoke to MAJ PARSON (Post Deputy Provost Marshal). SHAW briefly noted the appearance of the living room, dining room and kitchen before proceeding down the hallway. He observed the children's bodies in the NORTH and SOUTH bedrooms and noted three strips of blood on the edge of the doorway of the hall linen closet. After glancing into the hall bath, he contacted IVORY in the EAST bedroom.

Once SHAW had observed the EAST bedroom, IVORY requested him to process the SOUTH bedroom for evidence. Shortly afterwards DR. NEAL arrived and SHAW watched him as he checked the victims. SHAW stated that NEAL used no medical instruments during his examinations and that, in the EAST bedroom, nothing was disturbed or moved during the time NEAL was present (alluding to the fact COLETTE's body was not moved as NEAL remembered doing).

Upon NEAL's departure SHAW returned to the SOUTH bedroom. There he looked for fragile evidence, took notes, made sketches and drew the body outline of KIMBERLY as shown in Exhibit G-67.

At approximately 0630 hours SHAW participated in a search of the outside of the apartment looking for footprints (he found none) and other evidence. As he approached his utility room entrance, an MP pointed to a club lying on the ground which he said he had just found and had not touched. SHAW saw reddish-brown stains on it and what seemed to be hairs or fibers. Later SHAW noted the fibers on the club were from the throw rug in the EAST bedroom. Because the photographer lacked flash bulbs, SHAW placed sticks in the ground to mark its location. Then he collected the club as evidence and marked it. (See Exhibits A-20 and G-80 which depict the location.) (IO's Note—The actual club, Exhibit G-79, was examined in the hearing room and was quite heavy for its size.)

Upon continuing his search SHAW's flashlight beam and an MP's statement, caused SHAW to spot an ice pick and a paring knife (both bearing red-brown stains) under a bush at the northeast corner of the house. Since photos could not be immediately taken, SHAW covered the two items with boxes. SHAW instructed the MP to ". . . guard them and not let anyone touch them . . . other than myself (SHAW). . . ." (p 803). Later, after photos were taken, the items were collected and marked as evidence. SHAW identified Exhibits G-81 and A-22 as photos of the scene and identified Exhibit G-82 as the knife and Exhibit G-83 as the ice pick.

At approximately 0800 hours SHAW assisted IVORY in collecting the white towel and blue pajama top from COLETTE's body as evidence. SHAW held a plastic bag under each item as it was raised while IVORY used one hand and tongs for the removal. SHAW observed no threads fall off the garments. Before COLETTE's body was removed from the EAST bedroom by the ambulance attendants, SHAW watched IVORY and CID Agent CONNELLY outline her body (see Exhibit A-24).

SHAW observed the ambulance attendants next remove KRISTEN's body. Prior to the removal of KIMBERLY SHAW uncovered her body and drew an outline of the bedding (see Exhibit G-67).

Exhibit G-84, a small paring knife with a tent blade which was found in the EAST bedroom (See Exhibit G-48) was introduced into evidence. SHAW saw reddish-brown stains on it the morning of 17 February.

(IO's Note—Following considerable discussion between opposing counsel it was agreed that the front cover of the March, 1970, issue of the Esquire magazine (found in the living room underneath the coffee table), which can be seen in the Exhibit G-65 would become Exhibit G-85.)

SHAW testified that he noted about ten spots or streaks of reddish-brown liquid scattered about the ceiling light in the EAST bedroom. These spots or streaks appeared to run in a north-south line. He also identified Exhibit G-14 as a portion of the rug he cut from the

hallway entrance to the EAST bedroom containing reddish-brown stains.

Introduced by SHAW were Exhibits G-87 through G-96 which are expanded diagrams, in chart form, of each room in the MACDONALD apartment, showing the floor, walls and ceilings. The location of positions from which reddish-brown stains were removed is indicated as well as the blood type of the stain if later identified by the CID Lab. Not shown are stains removed from furnishings within the residence.

SHAW identified a piece of wood (Exhibit G-86) he found in the outside storage shed used by the MACDONALDS. He stated ". . . These paints (on Exhibit G-86 and the club, Exhibit G-79) appear to be by visual examination the same color. In addition, the paint is in such a configuration of design that they appear to have similarities . . ." (p 840). (IO's Note—Following visual comparison of the two the IO concurs. Lab reports indicate that the paint could have the same origin.)

On Exhibit G-45 SHAW circled, in blue ink, two areas he recalled as being wet spots that were reddish-brown in color. He also remembered seeing Valentine Day greeting cards on the dining room buffet, some from the ACCUSED to his children. These can be seen in Exhibit A-30 which SHAW recognized.

SHAW described how the premises had been secured subsequent to the initial arrival of the CID. He also stated that the light outside the kitchen door was on when he first went to the rear of the house. He also noted that the lock to the outside utility door entrance functioned properly. (pps 781-926)

CW3 FRANZ J. GREBNER, Commanding Officer of Detachment B, 3d Military Police Group (DI), Fort Bragg, North Carolina, testified that as head of the CID element at Fort Bragg, he was in overall charge of the military portion of the MACDONALD investigation. Furthermore, he coordinated this with the efforts of non-military investigative agencies.

He stated that ". . . in excess of 3,500 people. . . ." were interviewed by all investigative agencies, to include 20 FBI agents, in the first weeks following the murders. In the initial stages the majority of people were questioned about the four alleged assailants.

When GREBNER first arrived at the MACDONALD apartment on the morning of 17 February, he noticed two ambulance drivers inside the apartment. One was wearing a white jacket and blue jean trousers and standing inside the front door. Later they were instructed to go and sit in the ambulances. GREBNER stated that MAJ PARSON said that ". . . road blocks were in effect. . . ." (p 942), but GREBNER does not know where or when.

On a day to day basis GREBNER received all the reports and investigations on the MACDONALD case. He recalled no statements to the effect that (1) the MACDONALDS were in the habit of having violent domestic arguments; (2) that the ACCUSED beat his children; (3) that the ACCUSED showed signs of mental illness; or (4) that he had taken or was addicted to drugs.

GREBNER testified that all voluntary phone calls received by his office about the alleged assailants were checked by investigators. These investigators were to determine whether the individuals fit the description of the assailants and to establish their whereabouts and activities during the period in question. Of the 150-200 people checked, ". . . we were able to establish that these individuals were not on Fort Bragg on the night and morning in question. . . ." (p 948). Each alibi of an individual was checked; however the ACCUSED was never shown any photographs of possible suspects. (pps 927-950).

CW2 BENNIE J. HAWKINS, HHC, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he is a CID Agent who traveled to Suffolk County, New York, in May, 1970, to interview a ". . . colored male (JOSEPH LEE), approximately 5'-9 in height, 170 lbs in weight, black hair and brown eyes. . . ." (p. 902), who associated with a group of three others. From photos and

police records HAWKINS described the others as two Caucasian males—one was 5'10", 180 lbs., dark brown hair and brown eyes, the other was 5'6", 150 lbs. blond hair and blue eyes—and one female, 5'5"/6½", 110 lbs, blond hair and blue eyes. The four were close friends and ran together as a group. They were also friends with the ACCUSED's brother from the summer of 1969 to May, 1970, and lived with him and others in a house on Fire Island, New York.

HAWKINS stated the girl was known (according to police information) to have dressed in knee boots and a floppy hat and had different shade wigs. (pps 951-982).

B. ACCUSED

SP4 KENNETH C. MICA, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, who previously testified, stated he was enroute to 544 Castle Drive at approximately 0345 hours on 17 February. The patrol vehicle he was in stopped for 4 or 5 seconds at the corner of Honeycutt Road and North Lucas Street. MICA was in the passenger seat, and looking through the plastic side windows of his jeep, saw a female standing on the corner. He estimated her age to be between 20 and 30 years. She was wearing a wide brimmed hat, raincoat cut along the knees and she had ". . . pretty nice legs. . . ." (p 1023).

When MICA was assisting the ACCUSED in the EAST bedroom the latter described his assailants to MICA. MICA then told PAULK he had seen a female at the corner of Honeycutt and North Lucas. MICA had, on occasion seen a female on the corner at that time of night but ". . . it's not very common. . . ." (p 1008).

When shown a composite drawing of the face of a female (Exhibit A-31) MICA stated it could possibly be the person he saw; however, he admitted he could not identify any specific facial features of the girl.

MICA drew a diagram (Exhibit A-32) approximating the location of his vehicle with relation to the female he observed.

He denies telling MR WEISS (PMI investigator) about this incident but states that he did report it to COL KRIWANEK and to the FBI, both on 17 February. (pps 1005-1032)

MRS. WINNIE A. CASPER, 400 North 25th Street, Mineral Wells, Texas, testified by a conference telephone call that on 16-17 February she and her husband resided at 344 North Dougherty which is about 200 yards from the rear of the MACDONALD residence. She stated she went to bed approximately 2345 hours on 16 February and was awakened by her younger daughter at 0345 on the 17th to take her to the bathroom. At some time between 2345 and 0345 (closer to 0345) when ". . . (she was) not quite awake and drifting off to sleep . . . (s) heard laughing, '. . . running . . .' (p 1041) and scuffling. . . ." (p 1035) outside her open bedroom window on the second floor. She said she heard two male voices and one female voice and thought it was teenagers. She also heard a giggle and believes the voices were going in the direction of Castle Drive.

When her husband came home for supper on 17 February he asked if something woke her up ". . . last night, and I said, yes it did, and he said, well, was it kind of laughing, you know, sound like the kids next door, and I said, yes. . . ." (p 1036).

MRS CASPER thinks, upon questioning by government counsel, that she remembers her husband telling two CID agents at approximately 1800 hours on 17 February that he heard running and footsteps between 1900 and 2130 hours on 16 February. (pps 1032-1045)

CPT JAMES N. WILLIAMS, HHC, 6th Special Forces Group, Fort Bragg, North Carolina, testified he is an MSC officer who is the Operations and Training Officer

with the Surgeon's Office. WILLIAMS worked with the ACCUSED from December, 1969, to February, 1970, As the Group medical drug abuse counselor the ACCUSED would talk to soldiers who requested counseling. In mid-January, a lecture was conducted for all Group personnel on the subject of drug abuse. During the Chaplain's part of the lecture, he said he was the only person who had ". . . privileged conversation . . ." (p 1132) and that, at a court-martial, if a doctor is called to testify, he (the doctor) would not be able to shelter an individual.

Following the lecture WILLIAMS testified many young soldiers asked him ". . . if this was true. . . ." (p 1132) and WILLIAMS said yes. WILLIAMS stated that the following week there was a noticeable drop in the number of soldiers requesting medical drug abuse counseling.

Later WILLIAMS was told by some of his enlisted medics that ". . . they believed their men were being turned in to CID for being on drugs. . . ." (p 1133) and that the ACCUSED had the reputation of being a "fink". When WILLIAMS related this information to the ACCUSED, he laughed. (pps 1125-1147)

PROFESSOR WILLIAM G. WOLFGANG, Philadelphia College of Textiles, Philadelphia, Pennsylvania, testified by conference telephone call that he is a member of the faculty with his primary duty being the Director of Textile Apparel Research. He had the opportunity to examine the testimony of witness BROWNING, the forensic chemist from the CID Lab, as well as the CID Lab Reports relative to threads (yarns) and fibers.

WOLFGANG stated that in order to properly compare fibers of a mixed variety (cotton polyester, for example) the chemist needs at least a gram of the material; for yarns, he needs a piece at least a yard long. ". . . in textile identification we can actually say a lot more about where things didn't come from than where they did. . . ." (p 1174). Also, in identifying fibers, he said ". . . you could say that it could have come from a particular source, but you cannot say with any degree of certainty that it did come from it. . . ." (p 1175).

(IO-s Note—CID Chemist BROWNING used the same identification terminology, "could have", reference fibers in paragraph 26 of Exhibit G-7. (pps 1154-1176)

MRS. ELIZABETH ANN KRYSTIA, 301 Spear Drive, Fort Bragg, North Carolina, testified she met COLETTE while both were attending a night course in child psychology at the North Carolina State University branch on post. A friendship developed as both were pregnant and they drove to and from class together.

KRYSTIA stated COLETTE had great respect for her husband, that COLETTE's pregnancy was not planned and that she seemed ". . . relaxed and calm. . . ." (p 1181) on the evening of 16 February. In class that evening COLETTE raised the question of what to do about their youngest child coming into bed with them at night. The professor suggested returning the child to her own bed after reassuring her. COLETTE indicated she was satisfied with his advice.

Upon departure from class between 2120 and 2130 hours COLETTE drove to a PX Shoppette, purchased milk and then drove KRYSTIA home. KRYSTIA planned to, within the next day or two, take some books on child psychology to COLETTE. (pps 1177-1185)

MRS. SUSAN CHESTER, Post Office Box 767, Pinehurst, North Carolina, testified by conference telephone call, that in February, 1970, she and her husband lived at 306 Castle Drive, adjacent to the apartment of MRS. JAN SNYDER. On 17 February MRS CHESTER and her husband (then CAPT CHESTER) returned home for lunch and conversed with MRS SNYDER. MRS SNYDER told them that she was awakened that night (16-17 February) sometime after 0300 hours because her daughter was crying; that she heard a car running outside her house; that she looked out the windows and saw a girl with long blond hair running from the direction of the

MACDONALD house; and that this girl got into a red or maroon colored convertible and it pulled away.

Approximately two weeks later the CHESTERS related this information to FBI agents who came to their apartment. (pps 1192-1212)

MR. JOHN CHESTER, Post Office Box 767, Pinehurst, North Carolina, testified that in February, 1970, he was an Army Captain living at 300 Castle Drive adjacent to the apartment of MRS SNYDER. On 17 February Mr CHESTER returned home for lunch and heard MRS SNYDER say, in his and his wife's presence, that she (SNYDER) was awakened between 0300-0330 hours (on the night of 16-17 February) by her children yelling; that she heard a commotion outside in front of the apartment; and that she looked out the window and saw a woman, with long hair, and some men get into an automobile and drive away. MR CHESTER was not present for the entire conversation on the subject.

Ten days or two weeks later an FBI agent was given the information and three weeks after the incident MR CHESTER went to the CID office and related the information. MR CHESTER testified he was also present when MRS SNYDER related the same information to three neighbors.

Later, on 21 February at approximately 0800 hours, MR CHESTER was in bed when he was awakened by the sound of MRS SNYDER banging on the wall separating their apartments. He asked her, through the wall, what was wrong and she stated there was somebody out front with a gun. MR CHESTER went to the front bedroom, looked out and saw a late model light colored sedan with two individuals in it. The driver had a high-powered rifle with a telescopic sight which was pointed at the second story level of their apartment building. He went to get a shotgun and when he returned the car was driving off and was about 100 yards up the street. Immediately MRS SNYDER came over to the CHESTER apartment and together they telephonically reported the

incident to the MPs. MR CHESTER testified the driver of the car was a man and he did appear to be looking through the sights of the rifle. He could not observe the other individual in the car. There were other people outside at the time but MR CHESTER did not remember how many. He drew a diagram (Exhibit A-34) of the area which illustrated the general position of the vehicle he observed on the 21st. (pps 1212-1239)

DR. ROBERT L. SADOFF, The Benjamin Fox Pavillion, Jenkintown, Pennsylvania, testified he is a civilian psychiatrist with a speciality in forensic psychiatry. He examined the ACCUSED in Philadelphia on 21 April 1970 and engaged a clinical psychologist (DR. JAMES MACK) to conduct psychological testing, which results were used by SADOFF. He stated the goal of his psychiatric examination was ". . . to determine whether or not Captain MacDonald possessed a type of mental state that would be likely to result in the kind of tragedy or killings that occurred in his family . . ." (p 1241). His specific goal was ". . . to search for evidence for types of mental state that would be conducive or would even allow for this type of behavior. . . ." (p 1241).

SADOFF next described the methodology employed to reach his findings. He considered the fact that the ACCUSED, as a medical doctor, would have some knowledge of psychiatry. During the examination he feels the ACCUSED; cooperated fully and was not hiding facts or holding back information; had a normal reactive depression resulting from the deaths in his family; had no serious mental illness; ". . . Captain MacDonald felt guilty he was not able to save them (his family). . . ." (p 1248); and that, ". . . if I had found that he (ACCUSED) had sufficient psychiatric problem, emotional disability, then I would have told them (counsel for the ACCUSED). . . ." (p 1251).

SADOFF's conclusion was that the ACCUSED, ". . . does not possess the type of personality emotional configuration that would be capable of this type of killing of

his wife and children with the resultant behavior . . . that I saw in him on the 21st (of April . . ." (p. 1250). SADOFF also ". . . questioned him (ACCUSED) about things that perhaps he wasn't clear about or could not remember. He was not defensive about it. He accepted the idea that he could not remember some things or that things were very hazy. . . ." (p 1254). Upon being questioned would it be normal of the ACCUSED to be depressed if he had committed the crimes, SADOFF stated ". . . he (the ACCUSED) would not only be depressed, but he would be unable to compose himself . . . I think he would become psychotic . . ." (p 1255). When asked is and was the ACCUSED legally sane SADOFF replied, ". . . . I would say he knew the nature and quality of his acts and was able to adhere to the right. . . ." (p 1261).

Counsel for the government and counsel for the ACCUSED each asked a number of hypothetical questions relative to the ACCUSED's capability to do or not to do specific things. (IO's Note—All answers were satisfactory from the standpoint that the ACCUSED would not be able to successfully deceive the psychiatrist.)

In answer to a question by the Investigating Officer, SADOFF stated, ". . . It's rare that I'm asked to see a person to find out whether or not he possessed the mental capacity sufficient to be able or to be capable of such violence . . ." (p 1266). When asked could the ACCUSED have killed his wife if COLETTE had first killed the children the witness stated, ". . . I don't think its a great likelihood . . ." (p 1266), and later, ". . . it's highly unlikely, most extremely unlikely from my examination . . ." (p 1267).

In summary SADOFF does not believe the ACCUSED was capable of committing the crimes and if he had the ACCUSED would have become psychotic and could not have hidden this fact from the psychiatrist. (pps 1234-1269)

MR WILLIAM E. POSEY, 505 Mrytle Street, Fayetteville, North Carolina, testified that during January-

February, 1970, he lived in Apartment A, 1106 Clark Street, in the Haymount Section of Fayetteville. In the apartment across the driveway from his front door lived three "hippie-type" girls, one of whom was named HELEN (later identified by IVORY as HELENA STOKELY). POSEY described HELEN as having brunette hair and she normally wore a white hat and had a long stringy blond wig. POSEY stated the three girls lived there approximately three months and he would see HELEN a couple of times a day. During this period the girls had many (up to 30) people living or visiting with them to include soldiers and one Negro.

On 16 February, at approximately 2300 hours, POSEY went to sleep and awakened about 0345 to 0430 hours, 17 February, to go to the bathroom. At that time he "heard a car next door whip in . . . . real fast . . ." (p 1298) in the driveway. POSEY heard laughing and giggling so he walked to his front door. He saw HELEN get out of a MACH I Mustang, without a hat, and walk rapidly into her apartment with ". . . something in her hand. . . ." (p 1299). Judging by the sounds, the car contained at least two males. After HELEN got out the car drove away. Previously, POSEY had seen a blue MACH I Mustang at the girls' apartment, driven by a neat appearing male approximately six feet tall who had a mustache.

POSEY awakened his wife to show her that the other two girls in the apartment were painting designs on the walls and floor at that unusual time of the morning.

Approximately a week or two later POSEY had an occasion to talk to PAUL BOWMAN, a friend of both POSEY and the girls. They were talking outside when HELEN came up to them and stated that the police had questioned her several times, apparently shortly after the MACDONALD murders, concerning her whereabouts on the morning of 17 February. HELEN stated she could not remember where she had been because she was "stoned" on mescaline. She only recalled riding around that evening. She said she threw her boots away because they had a broken heel. She also threw away her hat but still had her blond wig. BOWMAN said HELEN

needed an alibi and when POSEY told them ". . . I can be her alibi because I saw her that morning . . ." (p 1305), HELEN ". . . kind of backed off . . ." (p 1305).

On the day of the MACDONALD funeral services on Fort Bragg, POSEY testified HELEN wore a black dress, black shoes, a veil and had a wreath on her door. She stayed in her apartment alone all day. When her boyfriend came by she refused to go out with him. Before this she generally wore purple clothes but after 17 February she always wore black.

POSEY stated that HELEN had been previously charged with possession of drugs. Most of her friends were in the Army. On one occasion, POSEY told the landlord, MR. TURNER, there were many people at the girl's apartment and that they made a lot of noise. TURNER came by that same evening and kicked out 10 or 15 guys and girls.

Prior to 17 February HELEN was always with her boyfriend but afterwards POSEY did not see him until the day of the MACDONALD funeral services.

On 11 August 1970, at the request of counsel for the accused, POSEY went to the Village Shoppe (in Haymount Hills) to attempt to learn HELEN's full name. POSEY located her and questioned her about the MACDONALD murders. He asked her, ". . . 'Well, did you do it? Were you a part of it?' and she said she dosen't know, just drew a blank, but . . . she didn't think she could kill anyone because she wasn't that type of person. . . ." (pps 1327-1328). Toward the end of this one hour conversation outside the Shoppe HELEN's boyfriend JIM drove up in his 1964-1965 yellow Plymouth. POSEY immediately departed (pps 1297-1342)

MR JOHN D. SUTTON, 110 Spring Avenue, Spring Lake, North Carolina, testified that on the evening of 17 February he was in Rick's Lounge on Hay Street opposite the railroad station in Fayetteville. From about 1900 to 2100 hours he had three or four beers. At about 2100 while standing at the far end of the bar (away

from the street entrance), he looked at the front door and saw ". . . a girl come in carrying a lighted candle, lit, and wearing a floppy hat. . . ." (p 1367). She was also wearing pants. With the girl were two white men. SUTTON also saw one Negro, wearing a fatigue jacket with Sergeant's stripes, standing in the corner of the bar.

Later, when SUTTON read an account in the Wednesday issue of the local newspaper describing a girl with a floppy hat and a candle, he stated he called a SCOTTIE SUTHERLAND of the CID (unidentified) to report his observations in the lounge. Approximately a week later SUTTON contacted the FBI and they stated they had the information.

During his testimony SUTTON drew a floor diagram depicting Rick's Lounge and the location and movement of people as he remembered it (see Exhibit 6-104). (pps 1366-1391)

MRS BARBARA DAW, 119 LeBlanc, Fort Bragg, North Carolina, testified she is the wife of CW2 DAW. In the summer of 1969, MR. DAW was stationed in Vietnam and MRS DAW resided in Fayetteville. She took in a female boarder. Two of the boarder's male companions (soldiers) were thought by MRS DAW to be involved in drug trafficking. She stated they threatened her and her two children named CHRIS AND KIM, and they took her car for their own use.

MRS DAW reported this incident to the North Carolina State Bureau of Investigation. Present at the time was a Chaplain (name unknown) from Fort Bragg. She wrote her husband in Vietnam and he returned on emergency leave and remained for reassignment to this area. In November 1969 they moved on post into Corregidor Courts at 119 LeBlanc Street. (pps 1392-1410, 1416, and 1418-1421)

CW2 ROY DAW, Headquarters Company, 6th Special Forces Group, Fort Bragg, North Carolina, testified he is the husband of MRS DAW. In August 1969, DAW

received a letter from his wife stating two men had taken her car and threatened to kill her and the children. DAW immediately came home on emergency leave. He located one of the two men, RANDLE FOSTER. FOSTER was a soldier terminee from the Special Forces Training Group awaiting reassignment orders. FOSTER blamed the other individual, TOM McCORMICK, for everything but did sign a note in the presence of his Commanding Officer for $620.00 damage to the DAW car. FOSTER then departed for Vietnam.

Later, in February or March, 1970, DAW was able to trace the location of McCORMICK to Vietnam. He was stationed in the same unit as FOSTER. On 17 February when DAW heard of the MACDONALD murders and noted the similarity of his childrens names to that of the MACDONALD children, he decided to call the CID. He then reported the incidents of the previous summer. (pps 1410-1415, and 1416)

The defense called approximately fifteen character witnesses to testify. Because most of it is both lengthy and repetitious, I have decided to present it in summary form.

Several civilian and military witnesses testified they observed the ACCUSED and his family, both socially and otherwise. Included within this group are: MRS ROBERT KINGSTON, wife of the former commander of the 3d Special Forces Group at Fort Bragg (pps 382-385); MRS CAROL BUTNER, whose husband was also a doctor with the 3d Special Forces Group, Fort Bragg (pps 1099-1106); MRS JEAN Morrell, whose husband is also a doctor and a former classmate of the ACCUSED in medical school (pps 1106-1111); DR. FREDRICK HERTER, who was a member of the surgical attending staff while the ACCUSED interned at Columbia Presbyterian Hospital (pps 1119-1125); MR ROBERT K. STERN, friend of the MACDONALDS (pps 1343-1347); COL ROBERT KINGSTON, former commanding officer of the 3d Special Forces Group, Fort Bragg (pps 377-381); CAPT and ILT (mrs) RICHARD

THOESEN, the MACDONALD's sponsors when they first arrived at Fort Bragg (pps 1086-1099); CPT FRANK MOORE and CPT JAMES WILLIAMS, MSC officers who worked with the ACCUSED in the 3d and 6th Special Forces Groups (pps 1111-11119 and pps 1125-1147); and MSG LEO J. VIOLETTI, the MCOIC of the medical section in which the ACCUSED worked (pps 1149-1153). In each case, these witnesses observed a close and loving intrafamily relationship. Professionally, he was thought of as both an excellent soldier and physician.

Two medical doctors who went through medical school with the ACCUSED and his family also testified. They were DRS PAUL MANSON (pps 1054-1072) and ROBERT C. McCANN (pps 1072-1086). While in medical school, they testified the ACCUSED both excelled academically and was a good husband and father. Both observed the ACCUSED while he was in Womack during the week 17-26 February 1970.

MRS BOBBIE SUE EVANS, a civilian nurse who is employed by the Hamlet Hospital, Hamlet, North Carolina, testified she worked with the ACCUSED, to include the 15th of February 1970. She stated he was a good doctor who displayed both compassion and understanding when treating children (pps 1046-1054).

MISS MARJORIE MURDOCK, an elderly lady from New York, testified she had formerly been a patient of the ACCUSED while he was interning in New York. She believed that the ACCUSED was one of the most humane doctors that ever treated her during her numerous stays in the hospital. (pps 1166-1192)

MR ALFRED KASSAB, the step-father (of 14 years) of COLETTE testified he had known the ACCUSED since age 12 because his step-daughter and the ACCUSED began seeing one another at that age. KASSAB observed their relationship from that time until the present and formed the opinion that theirs was nothing but a normal happy family situation. Because KASSAB was close to COLETTE, he was of the opinion she could not hide her emotions from him. KASSAB related an incident in which the ACCUSED apparently saved COLLETTE's

life shortly after the birth of their second child while COLETTE was in the hospital recovery room. Lastly, he emotionally offered the statement that he would still want the ACCUSED as his son-in-law if he had another daughter. (pps 1347-1363)

CAPTAIN JEFFREY R. MACDONALD, Headquarters and Headquarters Company, 6th Special Forces Group, 1st Special Forces, Fort Bragg, North Carolina, testified he is 26 years old and was president of his class and of the student council in high school, a member of various school organizations and a co-captain of both the football and the baseball teams. He attended Princeton for pre-med schooling on a partial scholarship and attended Northwestern for his medical degree where his class standing was 12th among 164 graduating students. He interned in surgery at Columbia Presbyterian Hospital in New York City. He married COLETTE in his second year at Princeton and both worked to get him through school and to pay living expenses. COLETTE was pregnant at the time of the marriage (p M-5).

The ACCUSED volunteered to come into the United States Army and, in turn, for assignment to the Special Forces, arriving at Fort Bragg 29 August 1969. During part of his off-duty time he "moonlighted" at Cape Fear Valley Hospital in Fayetteville, North Carolina, and at the Hamlet Hospital in Hamlet, North Carolina (p-M9). On Sunday, 15 February, at 0600, the accused began a 24-hour shift at the Hamlet Hospital. He did not see many patients that day, took one short nap during the day and slept approximately six hours that night. He returned to Fort Bragg on Monday morning, 16 February, had breakfast with his family and went to work at the 6th Special Forces Group Surgeon's Office. He had lunch at home, returned to work and at approximately 1600 hours played basketball.

Upon returning home he picked up KRISTEN and KIMBERLY and took them to feed their pony. The family ate dinner, prior to 1800 hours because his wife left for

class at North Carolina State University at 1815 hours. The ACCUSED then put the dinner dishes into the sink and watched TV with the children after putting them in their pajamas. At approximately 1900 hours he put KRISTEN to bed with a bottle of milk, returned to the living room floor and fell asleep. KIMBERLY awakened him so they could watch the TV program "Laugh In" together. At 2100 hours he put KIMBERLY to bed and returned to watch TV.

COLETTE returned home between 2130 and 2145 hours, put the milk she had purchased in the refrigerator and changed into her pajamas. She came into the living room and they watched TV and had some routine conversation. The ACCUSED thinks COLETTE may have had a drink (liquer) and watched part of the Johnny Carson Show. He thinks she went to bed around midnight. At some time after his wife had retired, KRISTEN awoke and the ACCUSED refilled her bottle and he heard no more from her. He finished watching the Johnny Carson Show and then washed the dishes, using rubber gloves he thinks.

Reference rubber gloves in the kitches he states, ". . . she had several kinds around. It was at least two pairs on the kitchen sink. There was a heavy yellow kitchen type of glove and some of the surgeons gloves that I had brought her home . . ." (p M-83).

Next the ACCUSED completed reading a Micky Spillane mystery while listening to a FM station on the stereo set. He was wearing his glasses while reading. He cut off the stereo, probably went to the small bathroom off the utility room but did not check doors to see if they were locked (p M-85). He states that a light in the kitchen and one in the hall bathroom were on when he was ready to retire. Lights were left on at night for the children in the event they awakened.

When the ACCUSED went into the EAST bedroom he found KRISTEN on his side of the bed (right side, facing the foot of the bed) asleep. She had wet the bed on his side so he pushed the c vers down along COLETTE and returned KRISTEN TO HER OWN BED. She had

her bottle with her at the time she was back in her own room.

Next he obtained an Afghan type blanket and went to the couch in the living room, shortly after 0200 hours, his head to the south end of the couch. His sleep was interrupted by COLETTE's ". . . very loud high pitched scream . . ." and then she said ". . . help, help Jeff. Why are they doing this to me? . . ." (p M-25). He also heard KIMBERLY screaming, "Daddy, Daddy" over and over. At this time he started to sit up and initially saw three people at the foot of the couch, two white males, one with a thin mustache, and a Negro with an Army field jacket to their right. Next he noticed a person, apparently female, with long blond hair and a light colored large floppy hat. The outline of her face appeared to be lit from underneath (p M-99). As the Negro was moving towards the ACCUSED between the coffee table and the couch, he heard the girl say, "Acid is groovy, kill the pigs", at least twice, and once said something like, "Acid and rain" (p M-27).

The Negro approached the ACCUSED with what appeared to be a raised club and swung it, striking the ACCUSED on the left arm and left forehead and knocking him back flat on the couch, causing him to literally see stars (p M-29). He then pushed himself back up again and he partially blocked the next swing of the club as he grabbed the Negro's arm and was holding the club. The ACCUSED attempted to get his left foot off the couch for leverage and then the two white males began to punch him on the chest, neck and shoulders and suddenly he ". . . got a very sharp pain in my chest, my right chest. . . ." (p-M-32). He then directed his attention to the two males at the end of the couch.

At this time his pajama top had, in some unknown manner, gotten around his wrists. He grabbed hold of a hand of one of the white assailants and noticed a blade and realized that he was in serious trouble. He is under the impression the hand was covered with a heavy rough grained rubber glove (p M-98). He attempted to get his hands free and to fend off the assailants when he was again hit by the club, this time in the shoulder. By this

time he thinks his left foot was on the floor, his right knee on the couch and he was pushing forward into the assailants at the foot of the couch, and last remembers seeing a knee and the top of what he thinks was a boot, probably on the hall stairs or at the end of the hall, and presumes the leg was that of a female. The entire episode took fifteen to thirty seconds in his estimation (p M-33).

The ACCUSED apparently lost consciousness because the next thing he remembers is lying at the living room end of the hall, face down, with his hands under his abdomen and still entwined in the pajama top. His teeth were chattering. His head and chest hurt, and he realized it was very quiet and the last thing he heard was screaming. He walked to the EAST bedroom and thinks he turned on the light. When he saw COLETTE, he took off the pajama top and dropped it, he went to COLETTE who was leaning against the green easy chair, removed a knife from her chest and threw it away. He then ". . . probably straightened her out a little bit . . ." (p M-107), gave her mouth to mouth resuscitation for a few seconds and noticed the air immediately bubbling out of her chest where he could see multiple wounds. He specifically remembers picking up his pajama top, opening it up, and laying it on COLETTE. He may have covered her with the white "Hilton" towel or something else but does not remember doing so (pps M-109-110).

Next the ACCUSED went to KIMBERLY's room, noticed a lot of blood on her neck and gave mouth to mouth respiration or checked pulses on this first of two trips to her room (p M-110). He noticed air coming from her chest and then went across the hall to KRISTEN's room. He checked her pulses and also gave mouth to mouth with the same results. Following this he went into the hallway, felt his head, noticed some blood on his hands and that his chest was bubbling. He then went into the lighted bathroom to check his injuries. He noted a contusion on his left forehead and, probably because his hands were bloody, washed his hands in the bathroom sink and thinks he dried them with tissues. He then went into the EAST bedroom again, checked COLETTE for a pulse, found none, pulled the pajama top down to again look at her

wounds and then dialed "O" on the telephone for the operator (pps M-41-42). (In subsequent questioning by government counsel the ACCUSED thinks he went directly to the telephone to call and then checked COLETTE, p M-114.)

He told the operator his name, that there had been stabbings, and that he needed police, MPs and doctors. The operator asked him if the address was on or off the post; he replied on post and she said it's an MP matter. Thinking he was getting no assistance from the operator he dropped the phone and then, noting the back door in the utility room was open, walked over to it and looked out but saw nothing of importance.

Next the ACCUSED again went to KIMBERLY's room and then to KRISTEN's room to check the children as it was difficult for his mind to accept what his doctors training told him was true reference their injuries and status. He then went down the hall into the kitchen, picked up the phone and heard both male and female voices. He repeated his request for assistance and heard someone say ". . . make that ASAP from Womack . . ." (p M-122) and thinks he dropped the phone. He thinks he washed his hands again at the kitchen sink either before or after the second telephone call. His next recollection is struggling with an MP who was breathing into his mouth in the EAST bedroom.

The ACCUSED remembers the scene in the EAST bedroom as being somewhat confused as there were several people (MPs) there, shouts and orders were heard, some tried to reassure him that everything was okay, but when he looked at COLETTE he thinks he said ". . . Jesus Christ, look at my wife. . . ." (p M-47). He remembers being questioned by several people in bits and pieces as to what happened, who did it, could he recognize the assailants, etcetera, and vaguely remembers falling off the stretcher in the hallway while being removed from the apartment.

The ACCUSED described his wounds as he observed them in the hospital noting some small puncture wounds (possibly ice pick type) which were apparently not observed or recorded by the treating physicians. Further

he states that although he saw investigators and phoned GREBNER at various times from 17 February up to and including April 6 he was never asked to view any person or photographs to determine if they resembled the assailants. He states that although several rings were returned to him at his request, there are two he has still not received.

When he went to the CID office on 6 April he was under the impression that MR. GREBNER would act upon his request to release some of his furniture from 544 Castle Drive. He was confused when MR GREBNER proceeded to read his rights against self incrimination and when MSSRS GREBNER, IVORY AND SHAW began to question him with a desk light shining in his face. He states that previously he, ". . . had never sat down with anyone and gone over the chronology, sequence of events or the full story of what had happened. . . ." (p M-65), but that, on the contrary, he had been trying to forget what had happened that night. They told him ". . . they felt that I had committed the crime. . . ." (p M-70).

The ACCUSED then related how his attorneys finally, after several previous attempts, convince him that he should have an artist attempt to draw an approximation of the assailants as he remembered them on 17 February. This was accomplished during a two week recess in the Article 32 hearing. Of the four drawings (Exhibit A-31, female; Exhibit A-36, man with mustache; Exhibit A-40, man without mustache; and Exhibit A-41, Negro) his recollection is best of the Negro and the white male with the mustache. At this time he also identified Exhibit A-42 (white floppy hat) as being similar to the one the female assailant wore on 17 February.

The ACCUSED related how KRISTEN had been awakening each night for a month or so and would frequently get into bed with her parents or with her sister. As a result sometimes one of the parents would move into KRISTEN's bed or onto the living room couch or KIMBERLY would move to KRISTEN's bed. The ACCUSED thought KRISTEN should be returned to her own bed but COLETTE didn't mind moving or giving KRISTEN a bottle if that was what she wanted. The ACCUSED did

not consider this an unusual situation as it had occurred with KIMBERLY when COLETTE was pregnant with KRISTEN.

When asked did the situation ". . . cause any particular stress or strain between your wife, what Kristy was doing . . .", the ACCUSED said ". . . absolutely not . . ." (p M-23). He also stated, ". . . you know your own family would never believe your word as a physician—and she said she would bring it up with her professor at the University . . ." (p M-23). When asked if he objected, the ACCUSED stated, ". . . absolutely not, because I knew he was going to say what I said. . . ." (p M-23).

Further questioning revealed that the ACCUSED loved his wife more than anything in the world, did not consider his children to be more important than his wife, does not think his wife was capable of murdering the children and that he devoted the additional time his Army service afforded him equally to his wife and children (p M-72). Upon cross examination by government counsel he admitted to sexual contact with a WAC in Texas in December 1969 and very, very infrequently during his marriage. He further stated that these events did not affect his relationship with his wife and that he did not tell her about them (p M-131).

He stated that when treating drug addicts in the hospital they would frequently threaten, as a common bad drug reaction is acute paranoia. On two separate occasions in early January, 1970, he informed a commanding officer and a First Sergeant that he had treated drug abusers from their commands. He denies ever previously seeing the two paring knives or the ice pick which were introduced into evidence and feels certain they did not come from his residence (p M-139).

In answer to questions by the Investigating Officer he stated that he has no idea whose hair was on the hair brush found by COLETTE's body, does not know why small pieces of surgical gloves were found in the top sheet from the EAST bedroom, remembers crying silent tears while going around to the various bedrooms, did not pull the covers from the bed in the EAST bedroom, has the impression the hands of some assailants he grabbed were

covered with heavier than surgical rubber gloves, does not remember checking the utility room rear entrance door to see if it was locked (assuming he used the small bath to brush his teeth), did not hear any furniture overturned during the struggle and, when asked, ". . . did you murder COLETTE and your children? . . ." replied, "No, sir." (p M-160). (pps M-1 through M-160 and 1650-1654).

C. GOVERNMENT REBUTTAL

SS6 DAVID L. WEISS, 125th Military Police Detachment (CI), Fort Bragg, North Carolina, testified he was on duty on 17 February as the senior investigator of the Provost Marshal Investigation Section at Fort Bragg. During the morning hours of that day SP4 MICA stopped WEISS in the hallway of the Provost Marshal's Office to pass on information relating to a female he (MICA) had observed while enroute to the MACDONALD residence as a result of the initial radio call.

WEISS stated MICA described the female as dressed in a raincoat with a rain bonnet and 5'6" in height with either light brown or blond hair. She was not wearing boots and she did have good looking legs. (pps. 1433-1441)

MR VERNON C. PARK, Pelham, North Carolina, testified that on 17 February 1970, he worked as the operations sergeant for the Provost Marshal Investigation Section. Between the hours of 1700 and 1915 on 17 February he and SGT JUDSON queried residents who were at home and residing on North Dougherty Street in Corregidor Courts to determine if they had seen or heard anything unusual on the night of 16-17 February.

PARK stated he questioned LT and MRS CASPER at their apartment front door. LT CASPER said he had gone to bed about 2230 hours. During the course of the evening between 1900 and 2130 he heard some

running foot steps and that they belonged to some children in the neighborhood.

PARK asked MRS CASPER if she had anything to add and also ". . . did you wake up during the night? . . . .", and she answered no to both questions. (pps 1441-1459)

MR JAMES G. JUDSON, Post Office Box 5555, Spring Lake, North Carolina, testified that on 17 February 1970 he was working as a Provost Marshal Investigator. He accompanied PARK to interview residents living on North Dougherty Street in Corregidor Courts.

JUDSON was present when PARK questioned the CASPERS and PARK made notes. JUDSON remembered LT CASPER saying he retired at 2230 hours but, prior to retiring, he had heard some kids running up and down outside between the hours of 1900 and 2100. (pps 1460-1463)

DR. RUSSEL S. FISHER, 111 Penn Street, Baltimore, Maryland, testified he is a pathologist of some years experience who interviewed the doctors who initially treated the ACCUSED. FISHER also spoke with the attending surgeon. FISHER also examined the medical records of the ACCUSED and, in the hearing room, examined his upper torso to determine the exact location of the wound that caused the pneumothorax.

FISHER stated that all of the ACCUSED's injuries could have been self-inflicted. He did not consider the head wound to be of significance. In FISHER's opinion, the stab wound that produced the pneumothorax, if shallow, would not be serious if treated, ". . . but if you enter a couple of inches you are going to get it in the diaphragm and into the liver. . . ." (p. 1496). FISHER further testified that when a knife is inserted two to four inches in that area (area of the ACCUSED's chest wound), ". . . then (that) makes it a serious business. . . ." (p 1498).

SP7 WILLIAM F. IVORY, 503d Military Police Battalion, Fort Bragg, North Carolina, is a CID agent at Fort Bragg who has previously testified. This current testimony relates to two separate interviews IVORY had with HELENA STOKELY, the first occurring in the offices of the Fayetteville Police Department, and the second some days/weeks later in the Cumberland County Jail. The first interview lasted approximately one hour, the second one-half to one hour. Answers to the same type questions during the second interview were basically the same as during the initial interview. (Apparently no attempt was made to check out the details of her first interview for inaccuracies prior to the second interview.)

(IOs Note—STOKELY was interviewed by the CID as a result of prior Article 32 testimony by POSEY who testified that he had seen STOKELY return home at approximately 0400 hours on 17 February 1970 in a Mustang car with some other people. POSEY further testified he was told that STOKELY had no alibi for her whereabouts during the early morning hours of 17 February and also that he (POSEY) had seen her sitting on the front steps of her apartment dressed in black and with a wreath on the front door on the date the MACDONALD funeral services were held at Fort Bragg.)

STOKELY, a red head, told IVORY she remembers driving out alone and returning alone (departing after midnight and returning about 0400 hours) on 17 February in a blue Mustang owned by a white male named BRUCE described as about 20, a former soldier and has dark hair. She was "on marihuana", left the house (apartment) sometime after midnight, ". . . just driving aimlessly. . . ." (p 1521), and because she was taking marihuana, she cannot remember her whereabouts for those four hours. She stated, according to IVORY, that she owned a large floppy hat but gave it away to a person unknown, had black boots but threw them in the trash; occasionally wore a blond wig borrowed from a girl friend (name unknown) which was returned subsequent to 17 February; and she refused an opportunity to testify in court (Article 32 hearing) because she, ". . . didn't want to get involved . . ." (p 1516).

STOKELY remembers Negroes visiting her apartment on occasion with EDDIE being the only name she can recall; when asked was she wearing black clothes on the date of the MACDONALD funeral she said, ". . . probably yes. . . ." (p 1593). She remembers that the FBI questioned her on 19 February; when asked was she in the MACDONALD house on 17 February, she said no and, ". . . She's sure if she had been there she would have known it. . . ." (p. 1553).

She willingly posed for a photograph (Exhibit G-105) following the first interview but seemed sensitive to IVORY's attempt to take notes of the interview so he took none.

IVORY is of the opinion that the FBI did interview STOKELY in February (under aliases unknown to IVORY) and that they were apparently satisfied with her alibi (for her whereabouts on 16-17 February). He believes that STOKELY's fingerprints were forwarded to the CID Laboratory at Fort Gordon for identification purposes but cannot say under what name or alias.

The Investigating Officer questioned IVORY on a separate matter relating to rubber surgical gloves. IVORY stated he did not see any surgical gloves on the kitchen sink (although MACDONALD remembers a pair being there when he washed the dishes on the night of 16 February) nor on the dryer in the utility room. IVORY did see a piece of a surgical glove near the left arm and head area of COLETTE. (pps 1508-1556)

D. ARTICLE 32 OFFICER

MRS JAN SNYDER, Route 5, Fairmont, North Carolina, testified she and her husband lived at 306 (?) Castle Drive. On the night of 16-17 February she was awakened by a noise (possibly a car) and went to the window. Going down the street was a car with round tail lights. She was unable to recall what time it was, and she does not remember hearing voices or seeing anyone running. She denies ever telling MR or MRS CHESTER, her next

door neighbors, or others that she saw or heard anyone that evening. (IO's Note—This testimony is in direct conflict with that of the CHESTERS).

Approximately 1020 hours on 17 February she reported to some investigators who came to her apartment the noise and sighting of the car.

On Sunday immediately following 17 February, MRS SNYDER and her husband were having breakfast when she looked out the window and saw a car with two young boys. One was holding a gun. She thinks the car was a light colored Buick convertible. Immediately she called the MPs. The person was holding the gun up, he was seated on the passenger side and the car was heading downhill. MRS SNYDER denies banging on the wall dividing the SNYDER AND CHESTER apartments to get assistance from CHESTER. (IO's Note—Parts of her testimony are in direct conflict with that of MR CHESTER.) (pps 1270-1294)

LTC BRUCE H. BAILEY, Walter Reed General Hospital, Washington, D.C., testified he is the Chief of Psychiatry Services. In response to a request by Investigating Officer, he and two other board certified psychiatrists conducted an examination of the ACCUSED. BAILEY also utilized the services of DR. JONAS RAPPAPOR who is a qualified psychiatrist specializing in forensic psychiatry. BAILEY was given background briefings by representatives of opposing counsel, had access to a copy of DR SADOFF's Article 32 testimony, the ACCUSED's testimony, results of a clinical psychologist's (DR JAMES MACK) testing of the ACCUSED, a summary of character witnesses testimony and finally selected testimony of witnesses who observed the ACCUSED immediately following the murders. CPT SEALE, the Article 32 Legal Advisor, handcarried the above listed documents to BAILEY.

BAILEY stated an electroencephalogram was accomplished on the ACCUSED and the reading was normal. He introduced his official report of the psychiatric evaluation (Exhibit R-1). When asked whether or not the time differential between when SADOFF saw the ACCUSED (two months after the murders) and BAILEY saw the ACCUSED (six months) affected the accuracy of his diagnosis, BAILEY said ". . . I think that the time factor is not significant, no. . . ." (p 1561). BAILEY stated that each member of his team concurred in the findings as reflected in Exhibit R-1 and that his position as Chief of the Service did not influence the opinion of the other two doctors involved in the psychiatric evaluation.

BAILEY testified the primary question that precedes all others is ". . . is . . . or was there any evidence of emotional disease, defect or derangement. . . ." (p 1561). BAILEY's opinion is that the ACCUSED knew right from wrong, was able to adhere to the right, was able to form intent with regard to the specific acts and the ACCUSED was able to cooperate in his own defense.

It is the opinion of BAILEY and his staff that the answer to the Investigating Officer's ". . . question regarding (the ACCUSED's) capability to commit a given act (this crime) is not within the realm of the psychiatric expert . . ." (p 1562). DR RAPPAPOR ". . . very definitely. . . ." (p 1564) agreed with BAILEY and his colleagues on that point. However, BAILEY's report (Exhibit R-1) did state "Our answer to the question regarding capability is that it is possible." When asked by the Investigating Officer could this statement be paraphrased by saying ". . . . anything's possible? . . .", he said, ". . . . Pretty close to that. . . ." (p 1574).

To the Investigating Officer's question concerning the ACCUSED's capability to hide this from himself and/or evaluators, BAILEY again stated, ". . . this is possible . . . (but) I have no evidence or impression that this was the case in terms of deliberate behavior . . ." (p 1562).

When asked how the ACCUSED would handle a sense of frustration in inter-personal relationships within his own family, BAILEY pictures him as ". . . working it out on the basketball court or going to the hospital and taking care of a lot of patients. . . ." (p 1590). BAILEY considers this a normal response. Also, BAILEY does not

think that the ACCUSED's recitation of the events of 17 February was a contrived story.

BAILEY further stated ". . . I have the rather strong impression that his (ACCUSED's) memory of the 16th and 17th is reconstructed . . . I consider it highly possible that details, major or minor, as to specifically what happened in the context of that time might well have been different from his . . . most recently stated under testimony, memory of that time. . . ." (p 1595). Later, in elaboration on this point and when asked by counsel what the process was that caused that (the reconstruction of events) BAILEY related ". . . the most common process is a very natural one that all of us human beings can experience when we've gone through something that is quite horrible to us. We put it out of our minds. We may tend to deny it. We may tend to restructure it somehow to make sense to us. I'm talking about very natural processes. . . ." (p 1597). BAILEY was also favorably impressed by the fact that the ACCUSED frequently could not give concrete answers to questions but would respond with "It must have been this way because that's the way we usually did it" (p 1597). Finally, on this point BAILEY thought that it was equally possible that the process of putting horrible details out of one's mind would be natural whether the ACCUSED had been the victim or had committed the crimes.

BAILEY agreed that there was no evidence that the ACCUSED was trying to hide facts from him. (pps 1557-1599)

1LT EDWIN G. CASPER, JR., 4th Student Officer Company, Fort Wolters, Texas, testified by conference telephone call that he formerly resided at 334 North Cougherty Street (Corregidor Courts), Fort Bragg. On the night of 16-17 February 1970 he went to bed approximately 2230 hours; however, his wife stayed up to watch TV. CASPER stated the windows in their bedroom were open. Sometime between 2400 and 0300 hours, CASPER was awakened and heard what he though were neighbor's children running up the path and splashing their feet in

water. He heard footsteps, laughing and running, probably from two or more people; the first time it ". . . seemed like they were running up from North Dougherty towards Bragg Boulevard . . ." (p 1605). He rolled over and went back to sleep. Approximately a half-hour later while half-asleep, CASPER heard them a second time. ". . . and it seemed like they ran back the other way . . ." (p 1605).

CASPER remembered that the CID questioned him at his home on 17 February, but he does not clearly remember his answers to their questions.

(IO's Note—During his testimony CASPER, on several occasions, paused for lengthy periods before answering questions. When Counsel asked, ". . . Are you conferring with someone as you answer these questions? . . . .", his answer was, ". . . Sir, my wife is trying to tell me what happened. . . ." (p 1606) (pps 1600-1607)

2LT JOSEPH L. PAULK was recalled and testified that on 17 February he was the MP Duty Officer. He was instructed by COL KRIWANEK to obtain from the ACCUSED a description of the assailants. PAULK identified a copy of his notes (Exhibit R-6) of that interview which occurred sometime between 0600 and 0700 hours on 17 February. The interview only lasted five to ten minutes and was conducted on one of the upper floors of Womack Army Hospital. After refreshing his memory by reading the notes, PAULK had nothing to add from memory to the ACCUSED's description of the assailants. (pps 1608-1612)

SSG WILLIAM A BOULWARE, 118th Military Police Company, Fort Bragg, North Carolina, testified that on the night of 16-17 February, he was the Military Police Desk Sergeant on duty at the Post Provost Marshal Office. At approximately 0342 hours on 17 February he received a telephone call from the chief telephone operator, Fayetteville. She said she had a party on the line she believed

lived at Fort Bragg and the party kept uttering, ". . . stabbing, 544 Castle Drive, hurry, 544 Castle Drive, help. . . ." (p 1613). BOULWARE told the radio operator located behind him, to send a patrol. She transferred the call to BOULWARE's line and he heard similar words. He then heard a ". . . clinging noise like the phone hitting against the wall or . . . something . . ." (p 1613). He assumed the ACCUSED dropped the phone. In approximately a minute he heard a weak whisper, ". . . 544 Castle Drive, stabbing, help . . ." (p 1613).

BOULWARE tried to determine from the ACCUSED what had happened but received no response to his questions. He told LT PAULK, who was in the building at the time, what he had heard on the phone and also told him he thought it was a domestic disturbance. PAULK departed for the address.

When the first patrol arrived at the residence he heard them call back over the radio and say the front door was locked. Roughly ten minutes elasped between the last time the witness heard the ACCUSED and the arrival of the first patrol. Over the phone BOULWARE heard someone (MP) say, ". . . we're here now. . . ." and ". . . get us an ambulance over here, get a couple . . ." (p 1614). At this time BOULWARE hung up the phone.

On the radio BOULWARE heard one patrolman say that there were two bloody bodies there, to get Womack fast and BOULWARE assumed the MP's partner was inside the house and that the was the one who picked up the phone. PAULK subsequently phoned BOULWARE and said words to the effect, ". . . we've got three bodies . . . I believe they're goners, and . . . thinks the old boy (ACCUSED) is still alive. What's holding Womack up?. . . ." (p 1616).

Next an ambulance driver said, over the radio, that he was lost so BOULWARE dispatched a patrol to guide them to 544 Castle Drive. Also over the radio he heard MP WILLIAMS describe the assailants as two male Negroes, one Caucasian and one female wearing a floppy hat. Assuming that all patrols were monitoring this description BOULWARE instructed them ". . . to stop any suspicious people in the area, fill out interrogation reports

and . . . 10 1 7 (bring them in). . . ." (p 1617). At approximately 0400 hours some patrols began to circulate in the Corregidor Courts, Mallonee Village and part of the Anzio Acres housing areas. Several called in and said they had stopped cars and were bringing people in to the Provost Marshal Office. BOULWARE remembered two sergeants who were getting ready to go to work and one person in a phone booth at Mallonee Village Shopping Center that were subsequently brought in. BOULWARE assumes that those patrols not permanently assisting at 544 Castle Drive returned to patrolling.

In answer to the question, ". . . Did any of your superiors instruct you to establish road blocks for purposes of apprehending the alleged assailants? . . ." (p 1618). BOULWARE answered in the negative.

Later PAULK called BOULWARE from the hospital and changed the description of the assailants to ". . . one male Negro wearing an Army field jacket with NCO chevrons on the sleeves, two Caucasians, one female. She had on a floppy hat and she was wearing boots. . . ." (p 1624). (pps 1612-1624)

CW3 FRANZ J. GREBNER, was recalled and testified that he is the Chief of the Fort Bragg CID. Primarily he was recalled to explain the administrative delay in the receipt of CID Lab Reports (See Exhibits G-107 and G-108). At the request of the Investigating Officer, he introduced COLETTE's pajama top (Exhibit R-7) and pajama bottom (Exhibit R-8) and the blue top sheet (Exhibit R-9) and multi-colored bed spread (Exhibit R-10) from the EAST bedroom. (pps 1625-2649)

E. IO'S VISITS TO 544 CASTLE DRIVE

As the hearing progressed, it became readily apparent that it would be beneficial for the Investigating Officer to personally view 544 Castle Drive, the MACDONALD

residence. Two visits were made, the first on 9 July 1970 and the second on 19 August 1970.

On the first visit, the Investigating Officer and his Legal Advisor were accompanied by the ACCUSED, counsel for both sides, the recorder and MR SHAW of the CID. The investigating Officer generally familiarized himself with the physical layout of the apartment and the contents therein, with the exception of various evidentiary items which had previously been removed and sent to the CID lab. (pps 276-280)

The details of the second visit were announced in the hearing by the Investigating Officer, as follows: ". . . Let the record reflect that during our recess, on 19 August 1970, between the hours of 2100 and 2200, Captain Beale and I were escorted by Mr. Grebner, Chief, CID, Fort Bragg, to revist 544 Castle Drive. Captain Beale made all arrangements with Mr. Grebner. I specifically instructed him to inform Mr. Grebner that at no time would I discuss the facts of the case with Mr. Grebner or ask any questions. Those instructions were obeyed completely during my visit and Mr. Grebner's sole function was to secure the premises. During my visit I made certain observations as a result of entering all rooms. I now wish to inform counsel for both sides of the relevant observations as follows. Number one, in the utility room I generally noted the titles of the many pocket type books located therein. Number two, I noted the presence of feathers in several rooms. Number three, I read the messages on the several Valentine cards in the dining room. Number four, I measured and noted the height of the ceiling in the living room was the same as the height of the master bedroom ceiling. Number five, I observed that there were no nicks on either the living room ceiling or the ceiling in Kimberly's bedroom. Number six, I saw a few pair of rubber surgical gloves under the kitchen sink, apparently in their original packaging. Number seven, I simulated the lighting conditions as per the accused's testimony. From a prone position on the couch, the length of which I noted, I was able to discern the facial features of Captain Beale at the end of the couch. The visibility increased considerably when I sub-

stituted as my source of light the lamp on the small dining room buffet. Number eight, and finally, I kicked over the coffee table. It struck the side of the rocking chair and came to rest on its edge. Upon my departure from the premises, they were again secured by Mr. Grebner. . . ." (pps 1425-1426)

I N D E X

WITNESS		FOR	VOLUME
BROWNING, DILLARD O.		GOVT	V
BUTNER, CAROL		ACCUSED	X
CASPER, WINNIE		ACCUSED	X
CAVERLY, ROBERT H.	Agent	GOVT	VII
CHAMBERLAIN, CRAIG	SP4	GOVT	V
CHESTER, JOHN W.		ACCUSED	XI
CHESTER, SUSAN		ACCUSED	XI
DAW, BARBARA		ACCUSED	XII
DAW, CORNELIUS	CW2	ACCUSED	XII
DUFFY, ROBERT J.	SGT	GOVT	III
EVANS, BOBBIE SUE		ACCUSED	X
GAMMEL, GEORGE E.	MAJ	GOVT	VI
GREBNER, FRANZ J.	INV	GOVT	IX
HANCOCK, WILLIAM F.	CPT	GOVT	VI
HAWKINS, BENNIE	INV	GOVT	IX
HERTER, FREDERICK	DR	ACCUSED	X
IVORY, WILLIAM F.	INV	GOVT	VII
JACOBSON, SEVERT	MAJ	GOVT	VII
KALIN, DONALD L.	CW3	GOVT	IV
KALIN, PAMELA		GOVT	V
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KINGSTON, ROBERT	MRS	ACCUSED	V
KRYSTIA, ELIZABETH		ACCUSED	XI
LANDEN, CAROLYN		GOVT	I
MANSON, PAUL	DR	ACCUSED	X
MCGANN, ROBERT	DR	ACCUSED	X
MEDLIN, HILYARD	MSG	GOVT	VI

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WITNESS		FOR	VOLUME
NICA, KENNETH C.	SP4	GOVT	II
		ACCUSED	X
MOORE, FRANK	CPT	ACCUSED	X
MORRELL, JEAN		ACCUSED	X
MORRIS, DENNIS	SP4	GOVT	IV
MURDOCK, MARJORIE		ACCUSED	XI
NEAL, WILLIAM P.	CPT	GOVT	IV
NEWMAN, MICHAEL D.	SP6	GOVT	V
PAULK, JOSEPH L.	1LT	GOVT	I
POSEY, WILLAM		ACCUSED	XII
SADOFF, ROBERT L	DR	ACCUSED	XI
SHAW, ROBERT B.	INV	GOVT	VIII
SNYDER, JAN		IO	XI
STERN, ROBERT		ACCUSED	XII
STRAUB, WILLIAM H	MAJ	GOVT	V
SUTTON, JOHN D.		ACCUSED	XII
TEVERE, RICHARD D	SGT	GOVT	III
THOESEN, MARY	1LT	ACCUSED	X
THOESEN, RICHARD	CPT	ACCUSED	X
VIOLETTI, LEO J.	MSG	ACCUSED	X
WILLIAMS, JAMES	CPT	ACCUSED	X
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MACDONALD, JEFFREY R	CPT	ACCUSED	Unnumbered

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R-1	Report of Psychiatric Evaluation
R-2	Credentials of Dr Bailey
R-3	17 Feb Sworn Statement of SP/4 Dickerson
R-4	25 Jun Sworn Statement of SP/4 Dickerson
R-5	22 Jun Sworn Statement of Mrs Janice Pendlyshok
R-6	Lt Paulk interview 17 Feb 70 W/Cpt MacDonald
R-7	Pajama top of Colette MacDonald
R-8	Pajama Bottom of Colette MacDonald
R-9	Blue top sheet from M.B. bed
R-10	Multicolored bed spread from M.B.. bed

ACCUSED'S EXHIBITS

A-4 Small house diagram.

A-5 Photo of MacDonald's wife.

A-6 Photo of MacDonald's wife.

A-7 Photo of doll and material near front room steps.

A-8 Photo of dining room to couch - coffee table area.

A-9 Similar photo, smaller scene.

A-10 Photo of master bedroom showing bureau w/phone.

A-11 Photo of female child, rear bedroom.

A-12 Photo of female child, rear bedroom. (Different perspective.)

A-13 B & W photo of master bedroom w/phone.

A-14 B & W photo of living room looking towards hall entrance - can see chairs and overturned coffee table and photog's equip.

A-15 Color photo of hall from living room and looking toward master bedroom and Mrs MacDonald's body.

A-16 (This is A-9)

A-17 Photo of Mrs MacDonald showing upper part of jacket w/blood and edge of bed.

A-18 View of south wall of master bedroom showing left side of bureau w/drawer closed.

A-19 TRUE POLICE magazine photo of photographer taking picture of bush and scene outside the MacDonald house.

A-20 Rear view of MacDonald residence showing stoop.

A-21 Photo of stick.

A-22 B &W photo of bush on NE corner of house.

A-23 Photo of child in front bedroom.

A-24 Photo of master bedroom showing blood on floor where Mrs MacDonald lay.

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A-31	Drawing of young female.
A-32	Diagram of location of young woman.
A-33	Christmas card from Colette MacDonald.
A-34	Drawing of area surrounding 306 Castle Drive.
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SUPREME COURT OF THE UNITED STATES

No. 75-1892

[Received July 13, 1977, Office of Solicitor General]

UNITED STATES, PETITIONER

v.

JEFFREY R. MACDONALD

ORDER ALLOWING CERTIORARI. Filed June 20, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 243991 49

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SC

Supreme Court, U. S.
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AUG 20 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1892

UNITED STATES OF AMERICA,
Petitioner,

vs.

JEFFREY R. MACDONALD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR JEFFREY R. MACDONALD

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In the Supreme Court
OF THE
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OCTOBER TERM, 1975

No. 75-1892

UNITED STATES OF AMERICA,
Petitioner,

vs.

JEFFREY R. MACDONALD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR JEFFREY R. MACDONALD

The respondent, Dr. Jeffrey R. MacDonald, respectfully prays that this Court deny the Petition of the United States for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. B)[1] is reported at 531 F.2d 196. The order of the court of

[1] "Pet. App." refers to the separately-bound appendix to the government's petition.

appeals (Pet. App. A) denying the government's petition for rehearing, with a suggestion for rehearing *en banc,* is unreported. The opinion and order of the district court denying respondent's motions to dismiss the indictment (Pet. App. D) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976. A timely petition for rehearing, with a suggestion for rehearing *en banc,* was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for the government for filing a petition for a writ of certiorari to and including June 29, 1976. On July 29, 1976, the Clerk of the Court extended the time for the respondent to file an answer to the petition for a writ of certiorari to and including August 18, 1976. On August 16, 1976, the Clerk of the Court further extended the time for filing an answer to and including August 20, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether respondent was deprived of his Sixth Amendment right to a speedy trial.

2. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

28 U.S.C. §1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

COUNTER-STATEMENT

1. In February, 1970, Jeffrey R. MacDonald, a medical doctor, was serving in the United States Army, attached to the Sixth Special Forces Group, at Fort Bragg, North Carolina. He resided with his family on the base.

In the early morning hours of February 17, 1970, Dr. MacDonald's wife, Colette, and his two daughters, Kristen (age 3) and Kimberly (age 6) were murdered, and Dr. MacDonald was stabbed in various parts of his body including his right lung, causing a near-fatal wound. The murders and assault were committed by the use of several knives, an ice pick and wooden clubs.

Dr. MacDonald reported to the authorities that the crimes had been committed by a number of persons, including a woman. The description of the woman furnished matched that of a person seen near the MacDonald household by a military policeman who was responding to Dr. MacDonald's telephone call for help.

The Federal Bureau of Investigation joined the Criminal Investigation Division of the Army (C.I.D.) in the early days of the investigation. However, the Army was given the responsibility of carrying out the investigation. On May 1, 1970, Army authorities arrested Dr. MacDonald and charged him with the murders of his family. He was placed in confinement under 24-hour armed guard and remained there throughout the subsequent military investigation and prosecution.

Proceedings against Dr. MacDonald were commenced under Article 32 of Uniform Code of Military Justice, 10 U.S.C. §832. The presiding officer was Colonel Warren V. Rock, an infantry colonel with thirty years of service and substantial court-martial experience. He had the full-time assistance of a qualified military judge, Captain Hammond Beale, as his legal advisor. Colonel Rock conducted the proceedings for a period of five months, from June through September of 1970. There were four full weeks of court testimony. And, an independent investigation was also undertaken by Colonel Rock.

Throughout the proceedings the government was represented by counsel who presented its case. Dr. MacDonald was present and represented by counsel at all times during the proceedings.

During the proceedings, Colonel Rock ordered the government to present all the evidence known to it. The evidence for the prosecution had been gathered as a result of months of effort by more than one hundred (100) military and civilian law enforcement investigators. These investigators had assembled evidence from

approximately 1,500 witnesses including persons in several foreign countries (A.673).

The home of Dr. MacDonald was taken over exclusively by military investigators and subjected to continuing examinations and searches. Large sections of walls and floors were taken as evidence. Blood stained clothing, wood and fiber samples were taken.

The hundreds of items of physical evidence that had been obtained by the government were subjected to intensive examination at the Criminal Investigation Laboratory of the Army, located at Fort Gordon, Georgia. Some evidence was also examined by other experts retained by the government. While some of this evidence was destroyed in C.I.D. laboratory testing, the remainder was the same physical evidence submitted to the Federal Bureau of Investigation laboratory in 1974. No new physical evidence was ever uncovered after the initial phases of the investigation in 1970.

The government called twenty-seven (27) witnesses against Dr. MacDonald during the military proceedings. Dr. MacDonald presented a full defense to the charges against him. He testified at length under oath and was subjected to an extensive and vigorous cross-examination by counsel for the government. He was also questioned extensively by the presiding officer. In addition to his own testimony, Dr. MacDonald called twenty-nine (29) witnesses on his behalf.

During the course of the Article 32 proceedings, Dr. MacDonald was subjected to two separate psychiatric examinations. One of these examinations was ar-

ranged by his counsel. The other examination was made by a team of three Army doctors at Walter Reed Hospital and was arranged by the presiding officer. In the words of Colonel Rock's final report, "there was a striking similarity in the conclusions" from these examinations (A.607). Those conclusions were that Dr. MacDonald was a sane, well-balanced adult and that "he was not hiding" any facts concerning the night of the murders of his family and the assault on him. In response to a question by the presiding officer as to whether Dr. MacDonald was "capable" of committing the gruesome killings of his wife and his children, a forensic psychiatrist advised the court that Dr. MacDonald was "not capable" of having committed these crimes (A.607).

On October 13, 1970, at the conclusion of military judicial proceedings under Article 32 of the Uniform Code of Military Justice, Colonel Rock, the presiding officer, submitted written conclusions and filed a ninety-page report and 2,000-page hearing transcript in support of his findings. His report concluded with two findings:

> (1) That the charges against Dr. MacDonald were "not true."
>
> (2) That the investigation of *another named individual, a woman,* be pursued as a suspect in the murders of the MacDonald family and the assault on Dr. MacDonald (A.603).[2]

[2]As noted in the government's petition, "A" refers to the appendix to respondent's brief in the court of appeals, a copy of which the government has lodged with the Clerk of this Court.

The findings of the presiding officer were subjected to two reviews by higher commanders. First, Major General Edward Flanagan made a full, independent examination of the findings and report of Colonel Rock. General Flanagan, who had originally convened the Article 32 proceedings, dismissed finally the charges against Dr. MacDonald.[3]

General Flanagan's decision to dismiss the charges was then subjected to an additional review by Lt. General John J. Tolson. He affirmed the dismissal of the charges.[4] On October 28, 1970, Dr. MacDonald was released from confinement.

On December 5, 1970, Dr. MacDonald was honorably discharged from the Army.

2. Approximately six months after his discharge from the Army, Dr. MacDonald moved to Los Angeles, California, where he is still living and is Director of Emergency Medicine at St. Mary's Medical Center, Long Beach, California.

From January, 1971 to 1972, the C.I.D. conducted an extensive re-investigation of the MacDonald family murders. The C.I.D. uncovered no substantial new evidence during this re-investigation (A.555).

The C.I.D. completed its re-investigation in December, 1971. It was not until approximately June, 1972 that the C.I.D. submitted the results of its re-investigation to the Justice Department and requested that the government seek an indictment against Dr. Mac-

[3]Brief for Appellee at 8, *United States v. MacDonald,* 531 F.2d 196 (4th Cir. 1976); Pet. App. B, 8a.

[4]*Id.*

Donald for the murders of his family. The Justice Department refused to pursue an indictment at that time (Pet. App. B, 9a).

From January, 1972 to July, 1974, Dr. MacDonald, in person and through counsel, requested the Justice Department to reach a final disposition of the MacDonald case (Pet. App. B, 9a, n.5; 10a, n.6). The Justice Department declined to act and asserted that it was conducting an "on-going" investigation of the case (Pet. App. B, 10a, n.6).

During that period the Justice Department conducted no significant investigation. The MacDonald case file was assigned and reassigned to a succession of staff attorneys who "reviewed and re-reviewed" the case (A.27). None of these attorneys took any definitive action on the case.

On January 10, 1974, Carl W. Belcher, Chief of the General Crimes Section, Criminal Division, Department of Justice, stated in writing and was quoted on January 10, 1974, as saying:

> . . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time.[5]

In July, 1974, Victor C. Woerheide, a Justice Department Attorney, was assigned the MacDonald case. He had no previous familiarity with the MacDonald case. In August, 1974, Woerheide began presenting

[5] *MacDonald v. United States* (4th Cir., No. 75-1621, decided July 1, 1975, *cert. denied*, 423 U.S. 926); Brief for Appellant at 55, n.35; *United States v. MacDonald, supra.*

evidence to a grand jury. Dr. MacDonald testified before the grand jury for six days.

From August, 1974 to January, 1975, the grand jury periodically heard testimony on the case. The grand jury proceedings were totally halted several times during those months so that Woerheide could take a five-week European vacation and later for him to attend to other personal matters.

On January 21, 1975, Dr. MacDonald testified for a second time before the grand jury. He was asked by a majority of the grand jurors to submit to a sodium amytol (the so-called "Truth Serum") interview. On January 23, 1975, Dr. MacDonald informed the grand jury that he was willing to undergo the sodium amytol procedure and that the results would be available to the grand jury in little more than one week. On January 24, 1975, the government's attorneys submitted a bill of indictment to the grand jury and Dr. MacDonald was indicted on the same day.

An indictment (No. 75-26-CR-3 of the Eastern District of North Carolina), charging Dr. MacDonald with three counts of murder in violation of 18 U.S.C. § 1111, was returned on January 24, 1975, more than four and one-half years after he had been initially arrested. Dr. MacDonald was arrested a second time at his home in Los Angeles, California, imprisoned, and held without bail until he was released on bond following a bail reduction hearing.

On April 8, 1975, he filed ten pretrial motions in the district court, all of which were subsequently heard and decided by Judge Franklin T. Dupree, Jr.

On May 30, 1975, Dr. MacDonald's motion for a change of venue to Los Angeles, California was denied by the district court.[6]

On July 28, 1975, the district court denied Dr. MacDonald's motion to dismiss the indictment because of discrimination in the selection of the grand jury (A.3).

On July 29, the district court also denied, in a single four-and-one-half-page order and opinion, seven other separately filed pretrial motions (Pet. App. D 44a). Dr. MacDonald appealed this decision to the court of appeals, which granted a stay of the trial and allowed the appeal (Pet. App. C, 42a). The appeal was allowed because the court of appeals found that "the contentions made are not frivolous and the rights asserted [both the speedy trial claim and the double jeopardy claim] are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost" (Pet. App. C, 42a-43a).

On January 23, 1976, the court of appeals reversed the district court and remanded with directions to dismiss the indictment on the ground that Dr. MacDonald had been denied his Sixth Amendment right to a speedy trial (Pet. App. B, 3a-27a).

3. The government has summarized in its petition, in part, the sequence of events in this case following

[6]The court of appeals dismissed respondent's appeal from this order, *MacDonald v. United States* (4th Cir., No. 75-1621, decided July 1, 1975, *cert. denied*, 423 U.S. 926). It also denied his petition for a writ of mandamus to compel the district court to grant the change of venue, *MacDonald v. United States* (4th Cir., No. 75-1681, decided July 15, 1975, *cert. denied*, 423 U.S. 927).

the indictment of the respondent. In its discussion of the dissent of Judge Craven in the court of appeals it makes clear that he substanially relied for part of his views on a conclusion that Dr. MacDonald was never arrested by the Army in 1970 (Pet. App. B, 38a). However, the government concedes its doubts about the efficacy of this conclusion later in its Petition for Certiorari. At pages 18-19, n.13, the government states it is willing to accept for the purposes of the petition, that Dr. MacDonald was arrested on May 1, 1970.

REASONS IN OPPOSITION TO GRANTING THE WRIT

1. THE SPEEDY TRIAL ISSUE

a. It would be inappropriate for the Court to grant the government's request for certiorari on the speedy trial issue. In sustaining Dr. MacDonald's contention that he was denied his right to a speedy trial, the court of appeals relied upon the standards set down by this Court in *Barker v. Wingo,* 407 U.S. 514 (1972). The application of those criteria was both precise and accurate. And, they were applied to a case that concededly is unique and extraordinary on its facts.

The *Barker* test required the courts below to consider the length of the delay, the reasons for the delay, the assertions of the speedy trial right by the defendant and the prejudice to him. *Barker, supra,* at 530.

The length of the delay, nearly five years from the formal accusation of the defendant until indictment, was by any analysis an extreme one. Dr. MacDonald was arrested and charged with murder by the United States Army on May 1, 1970, and became the "accused" within the meaning of the Sixth Amendment and thus his speedy trial rights were triggered.[7] *United States v. Marion,* 404 U.S. 307 (1971). He was not indicted until January 24, 1975, more than four and one-half years later. As the Court explained in *Barker, supra,* at 530, the length of the delay is a "triggering mechanism," which determines whether it is necessary to consider the other three criteria. And, the Court in *Barker* considered a period of more than four years more than enough to require inquiry into the other criteria.

The second of the *Barker* criteria is the reason assigned by the government for the delay in the present case. This Court in *Barker, supra,* at 531, explained that:

> . . . different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence . . . should be considered since the ultimate responsibility for the circumstances must rest with the government rather than with the defendant. Finally,

[7]The Solicitor General concedes for the purpose of his petition the fact of Dr. MacDonald's arrest in May of 1970. Petitioner's Brief For Certiorari n.13, at 19.

> a valid reason, such as a missing witness, should serve to justify appropriate delay.

The respondent does not claim that the delay was a deliberate attempt to hamper his defense. And, the government has not suggested that its delay resulted because of a missing witness or related reason. Rather, it is in the middle ground of negligence and indifference to Dr. MacDonald's constitutional rights that the cause of the delay is to be found.

The Criminal Investigation Division of the Army, at the request of the Department of Justice, reinvestigated the MacDonald case. After a one-year investigation, the C.I.D. submitted a thirteen-volume report of its findings to the Department of Justice with a recommendation that an indictment be sought against the respondent (Pet. App. B, 9a).

However, the Department of Justice failed to act. Instead, the files were "assigned and reassigned" and "review(ed) and re-review(ed)" (A. 27).

In January 1974, the Chief of the General Crimes Section of the Criminal Division of the Department of Justice, Carl Belcher, was writing that there was insufficient evidence to bring Dr. MacDonald to trial (Pet. App. B, 10a, n.6). And, in response to a letter from Dr. MacDonald's counsel, in which the respondent was urging the final disposition of the case, Belcher answered with the investigator's catechism that "the matter is under investigation," and "that this case will remain under consideration *for the foreseeable future*" (Pet. App. B, 10a, n.6, emphasis supplied).

In fact, the MacDonald case was not under active investigation for most of the time it was in the Department of Justice. The court of appeals found that "no significant new investigation was undertaken during this period [of more than two years after the C.I.D. made its recommendation in June 1972], and none was pursued from August 1973 until the grand jury was convened a year later" (Pet. App. B, 21a).

And, the only significant result of the grand jury proceedings was to have the Federal Bureau of Investigation Crime Laboratory re-examine and reinterpret the evidence that had been in possession of the government for four and one-half years. The government was challenged on the issue of whether it had developed any new evidence that would account for the extraordinary delay in the case. The colloquy that took place between the United States Magistrate and counsel for the government at the bail reduction hearing in this case provided the answer:

> THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .
>
> ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: all that evidence has been produced *within the last five months* by the F.B.I. Lab.
>
> THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?
>
> ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence *was in existence the whole time:* the bloody sheet, the bath mat and the . . . .

> THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?
>
> ASSISTANT UNITED STATES ATTORNEY: That's correct. (A.55, emphasis supplied.)

When the Magistrate asked counsel for the government to explain the delay, he was told that "government bureaucracy" was to blame (Pet. App. B, 22a).

The court of appeals did not misapply the criteria of this Court when it concluded that this is an unacceptable excuse for delaying the prosecution of Dr. MacDonald. "Government bureaucracy" is another way of saying that the Justice Department was unable to regulate itself and to meet the obligations imposed upon it by the Sixth Amendment to

> . . . move with the dispatch that is appropriate to assure an accused an early and proper disposition of the charges against him. *Marion, supra,* at 313.

If the court of appeals had not rejected the "government bureaucracy" excuse in this case, then every government delay would have to be excused on the ground that it was the best that can be expected from inefficient, indifferent and even negligent prosecution agencies.

Part of the "government bureaucracy" delay was due to the time consumed to allow a succession of attorneys to "become familiar" with the case. The affidavit of Deputy Assistant Attorney General Kevin T. Maroney described the process:

> The case was assigned and reassigned to various staff attorneys, of the General Crimes Section, who repeatedly reviewed and re-reviewed the matter. Numerous conferences were held . . . (A. 27-28).

However, Mr. Maroney never explains what action, if any, the Department of Justice took as a result of this constant review and re-review of the matter. The government itself offered no reason why so many attorneys were used. Nor, when one attorney had studied the case, why he or she did not submit a recommendation as to the disposition to be made of the case. But when the matter was finally turned over to a Justice Department attorney with instructions to proceed with the case, he was able to review all the files and commence the presentation of evidence to the grand jury within one month after being assigned to the matter.

Perhaps, as this Court suggested in *Dickey v. Florida,* 398 U.S. 30, 38 (1970), having too few lawyers may make some delay inevitable. But, a delay resulting from having *too many* lawyers is not inevitable.

The third factor this Court laid down in *Barker* is the defendant's responsibility to assert his right. The court of appeals found that Dr. MacDonald had "consistently expressed a desire to have the case resolved" starting as early as January, 1972 (Pet. App. B, 24a). His attorney wrote letters to the Justice Department offering the government the opportunity to question Dr. MacDonald and asking for a final decision on the matter (Pet. App. B, 2a, n.5; 10a, n.6; 24a).

Far from impeding the prosecution, Dr. MacDonald testified and was cross-examined at his Article 32 hearing; he submitted voluntarily to a C.I.D. interview on February 19, 1971 (A. 557); he waived immunity and testified for six days before the grand jury; and he repeatedly offered to be interrogated by the Department of Justice. He even agreed to a grand jury request to submit to interrogation under sodium amytol. But all of Dr. MacDonald's requests for expedition were ignored by the government.

"Both the facts and the law," the court of appeals held, "warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial" (Pet. App. B, 24a). By any reckoning this factor, too, must weigh heavily on respondent's side of the balance. *Barker, supra.* And, the court of appeals properly applied it in its analysis.

The fourth factor this Court laid down in *Barker* for judging speedy trial claims is one of prejudice to the accused. In discussing this factor, this Court said:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker, supra,* at 532.

Dr. MacDonald has twice been subjected to confinement, for a total of more than six months, as a result of these charges. However, this Court has

specifically held in *Klopfer v. North Carolina,* 386 U.S. 213 (1967) that oppressive pretrial confinement is not required for relief under the speedy trial portion of the Constitution.

But, Dr. MacDonald's ability to present his defense has seriously been impaired by the passage of so many years. The case against Dr. MacDonald is, in the words of the court of appeals, "wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime" (Pet. App. B, 5a-6a). It depends on the recollection of such details as the position of a chair or flowerpot, the manner in which a pajama top was folded. Such matters are difficult enough to remember accurately immediately after the event; five years later it is nearly impossible to rely on the accuracy of the witnesses' recollection of such details. The best that could be hoped for after so much time, is testimony from memories "refreshed" by reference to records and transcripts where they exist.[8]

Even the termination of the military proceedings against Dr. MacDonald and his release from detention on bail, in the words of the court of appeals,

[8]In this regard, the court of appeals noted:

> The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked (Pet. App. B, 26a).

And, this Court declared in *Barker* that "loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532.

"did not . . . dispel the effects of the government's initial accusations" (Pet. App. B, 17a). The court pointed out that "MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him" (Pet. App. B, 17a). And, as a result Dr. MacDonald also suffered intangible, but nonetheless real, prejudice as outlined by the Court in *Klopfer* and *Barker*. He has had to retain counsel, at enormous expense, for more than six and one-half years. He has lived for those years with "anxiety and concern" of this unresolved prosecution (*Barker, supra,* at 532) and with the public scorn (*Klopfer, supra,* at 222) and obloquy (*Marion, supra,* at 320) attendant upon his having remained for six and one-half years the only suspect in the murders of his wife and children.[9]

It was apparent to the court of appeals that by the criteria set forth in this Court's speedy trial cases, dealing with intangible as well as tangible prejudice to an accused, Dr. MacDonald has suffered prejudice from the unwarranted delay in bringing his case to trial. This factor was properly weighed against the government.

So, in scrutinizing the application of *Barker v. Wingo, supra,* by the court of appeals, it is apparent that the decision in the *MacDonald* case does not raise

[9]If this Court felt it necessary to take into account the public feeling toward Klopfer, who was accused of nothing more serious than having refused to leave a restaurant when asked to do so, surely the public feeling against Dr. MacDonald, accused of having murdered his family, cannot be viewed less seriously.

questions that are so difficult, so significant, and of wide enough general application to require review by this Court on certiorari. It does not require another opinion of this Court to establish that a delay of more than four and one-half years between institution of criminal proceedings and indictment is sufficiently long to justify an inquiry into the rest of the *Barker* criteria. It does not require review by this Court to establish that "government bureaucracy," inefficiency in the Department of Justice, and an unexcused four-year delay in submitting obviously material evidence to the Federal Bureau of Investigation for a second laboratory examination, are not adequate reasons to justify or excuse the delay. And yet, these are the reasons advanced by the government to excuse its conduct. The court of appeals properly weighed these circumstances heavily against the government.

It is not necessary for this Court to pass on the consistent assertion by Dr. MacDonald of his right to a speedy disposition of his case because the government has never seriously contended that he did not do so.

After the opinions of this Court in *Klopfer, Dickey, Marion* and *Barker,* it is not necessary to have yet another decision of this Court in order for there to be recognition that the respondent was prejudiced by the years of delay in this case.

Respondent suggests that the determinations the Solicitor General asks this Court to make in *MacDonald* have already been made in *Barker, supra,* and that the criteria set forth there have been precisely

and correctly applied by the court of appeals. There are certainly cases in which the application by lower courts of the four criteria of *Barker* is not clear, and in which the guidance of this Court is needed to assure the correct application of the speedy trial provision of the Constitution. But they were clear enough here for the court of appeals to be guided in its determination, and that court followed the guidelines correctly.

b. The government suggests that review is needed to resolve a "conflict" with cases from two other circuits, *United States v. Bishton,* 463 F.2d 887 (D.C. Cir. 1972) and *United States v. Flores,* 501 F.2d 1356 (2d Cir. 1974). The suggestion is a make-weight argument without merit. The decisions in these cases do not indicate a conflict with *MacDonald.*

In *Bishton, supra,* the delay complained of was only three months. In *MacDonald,* even when the time for the lengthy C.I.D. "re-investigation" is excluded, the delay complained of is more than two and one-half years.

Further, the delay in *Bishton* resulted from a "highly technical" flaw in the indictment (*Bishton, supra,* at 890-91) and from the choice of the wrong court in the judicial structure of the District of Columbia to which an appeal was taken. There was no allegation that the government did not proceed with creditable speed and at a pace that was at least deliberate. The problem was simply that it had chosen the wrong court for the appeal and a negligible time delay resulted. The court in *Bishton* stated:

> We do not intimate that the delay caused by appeals by the Government may never constitute denial of a defendant's right to speedy trial. Whenever the Government's action at any stage of the proceedings indicates . . . neglect . . ., the resulting delay is not justified. *Bishton, supra,* at 890.

After discussing the reasons for the delay in Bishton's case, the court concluded that:

> The foregoing analysis of the delays in this case reflects no neglect, indifference, or lack of reasonable diligence on the part of the Government. *Bishton, supra,* at 891.

How very different *Bishton* is from *MacDonald,* where the very gravamen of the respondent's complaint and the court of appeals findings are: that the Government let years pass through inefficiency; through passing of files from attorney to attorney until a few months before the expiration of a statute of limitations; through neglect, because of "bureaucracy," to re-analyze existing evidence; and, through unconcern for speedy trial rights despite repeated efforts by the accused to have them respected. The Court in *Bishton* declared that if it had been a case

> . . . where the delays could not be explained or justified by the government . . ., then the balance between the interest of the public and the protection of the individual might be different. *Bishton, supra,* at 891-92.

But, that, of course, is the *MacDonald* case. It is difficult to see the conflicts that the Solicitor General perceives as existing.

The *Flores* case does not even deal with the Sixth Amendment, which is entirely the basis for the decision in *MacDonald.* The speedy trial right allegedly violated in *Flores* arose from Rule 4 of the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases. That plan provided for dismissal with prejudice if the government was not ready for trial within six months of arrest or charge. While allowance was made for certain excusable delays, the local rules did not permit the government more than six months cumulative delays before trial. *Flores* is not a Sixth Amendment case and cites none of this Court's speedy trial decisions. It was decided entirely under local Rule 4 and does not pose any conflict with *MacDonald.*

The government's allegation of conflict among the circuits is frivolous.

c. The government also urges that review is necessary because Dr. MacDonald was released from custody and the charges against him dismissed after his first (Army) prosecution. "A necessary consequence" of the language of *Marion,* the Solicitor General argues:

> . . . is that the right to a speedy trial is not implicated in the period after the charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or surface interference with his liberties; necessarily, there can at that stage be no Sixth Amendment obligation upon the government to bring to trial expedi-

> tiously a person against who *(sic)* no criminal charges are outstanding. Petitioner's Brief for Certiorari at 18.

This argument fails both on the facts and on the law. It fails on the facts because even after the dismissal of the Army charges, Dr. MacDonald remained under active suspicion. He was openly and exhaustively reinvestigated by the C.I.D. Even when he was out of the Army, Dr. MacDonald was reinterrogated by the C.I.D. in a formal, recorded session on February 19, 1971 (A. 557). He was given *Miranda* warnings at that time. The suspicion of him was public and continuous during the period following the dismissal of the Army charges.

Even more seriously, the government's argument fails on the law. There was no significant difference between Klopfer, released from custody because the charge against him was *nolle prossed* but subject to reprosecution by North Carolina, and MacDonald, released from custody, the charge against him dismissed, but still subject to prosecution by the United States. As the court of appeals said, Dr. MacDonald's case "bears a marked resemblance" to Klopfer's (Pet. App. B, 18a). After formal arrest and charge, Klopfer and MacDonald both contested their accusations with apparently inconclusive results. The prosecution authorities in both cases believed they had a right to go forward promptly, but neither proceeded to a trial. Both defendants were deprived of any forum in which to vindicate themselves, and both had to await the government's pleasure, which was far from prompt.

And, in both cases it was held that the defendant's Sixth Amendment rights to a speedy trial were not extinguished by the first dismissal of the charges against him, if a second prosecution was not barred. As the court of appeals recognized, the contention of the government cannot survive a reading of this Court's opinion in *Klopfer*.

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2. THE INTERLOCUTORY APPEALS ISSUE

The petition in this case should be denied because the government's claim, that the issue of interlocutory appeals in criminal cases is such a "vexing" matter (Petitioner's Brief for Certiorari at 15) that it requires present review by this Court, is an illusory one.

First, in the more than twenty-seven years since the rule in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was announced, the courts of appeals have applied the rule rigorously to prevent defendants from obtaining unwarranted pretrial delays by the filing of unmeritorious interlocutory appeals.

This Court has before it memoranda from the Solicitor General in three cases,[10] in addition to the present one, in which the government has raised the issue of interlocutory appeals. In not one of these memoranda has the government pointed to a single fact to sustain

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[10] *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3749 (U.S. June 21, 1976) (No. 75-1844); *Barket v. United States*, 530 F.2d 181 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3584 (U.S. Mar. 9, 1976) (No. 75-1280); *Abney v. United States*, 530 F.2d 963 (3d Cir.), *cert. granted*, 96 S. Ct. 2646 (1976).

its contention that interlocutory appeals in criminal cases have raised a problem of significant proportion. The government points to no data to indicate that such appeals have created any measurable burden to the costs of appeals or delay in district courts.[11] It has failed to do so because the facts or data would not sustain the government's suggestions.

Second, the government's characterization of the present case as an appropriate one for review because it arises "in a context not complicated by the special circumstances that may obtain in cases involving double jeopardy claims" (Petitioner's Brief for Certiorari at 15) patently ignores the facts. This case presents more complications than any of the other so-called interlocutory appeal cases before this Court.

The case was originally before the court of appeals because of Dr. MacDonald's double jeopardy/collateral estoppel claim. That claim, based upon a 1970 military proceeding which concluded with a formal finding that the murder charges were "not true," was found to be "not frivolous" (Pet. App. C, 42a). The court of appeals withheld ruling on the claim, however, because of concern for its possible impact on the military justice system (Pet. App. B, 28a). Because of judicial restraint, the court limited its ruling to the speedy trial claim of respondent. But it is clear that the court of appeals perceived the double jeopardy and speedy trial claims of Dr. MacDonald to be of equal importance and merit from the outset (Pet. App. C, 42a).

[11] In fact, the contrary is true. *See* pp. 35-36 *infra*.

The present case, by every standard, presents one set of unique facts after another. The Solicitor General has had occasion previously to acknowledge this to this Court.[12] The respondent's counter-statement of facts details some of the extraordinary background of this case.

Third, the courts of appeal and district courts are well equipped to deal with frivolous interlocutory criminal appeals. The courts of appeal have dealt swiftly with such appeals by granting government motions to quash erroneously brought cases. Where they have undertaken to hear pretrial appeals on a double jeopardy claim, they have on occasion also considered the so-called pendent issues for the purposes of swiftly disposing of them to prevent further delay by the defendant. (See *Abney v. United States*, note 10 *supra*.)

And, district courts have not found themselves prevented from proceeding to trial just because a criminal defendant has filed a frivolous interlocutory appeal. Such appeals have been held, in a number of cases, not to divest the district court of its jurisdiction to proceed with the case.[13]

[12] Respondent petitioned this Court for review of the denial of his efforts to obtain a change of venue. *MacDonald v. United States, cert. denied*, 423 U.S. 926, 927 (1975). The opposition memorandum of the Solicitor General observed, "Petitioner's contentions turn upon the *rather unusual facts* of his case, and he presents no questions of general importance requiring review by this Court." Memorandum in Opposition, at 4. (Emphasis supplied.)

[13] *Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972); *McCann v. Kerner*, 436 F.2d 1343 (7th Cir. 1971); *Babcock & Wilcox Co. v. Foster Wheeler Corp.*, 54 F.R.D. 474 (D.N.J. 1971).

In urging this Court to review the action of the court of appeals in deciding the *MacDonald* case on an interlocutory appeal, the government relies heavily on its earlier memoranda submitted to this Court in *Abney v. United States,* note 10 *supra* and *United States v. Barket,* note 10 *supra.* The argument found in each of these petitions does not properly address itself to the propriety of the action of the court below in entertaining an interlocutory appeal in a case as unique as *MacDonald.*

a. In *Abney* the government simply asserted that both of petitioner's claims (double jeopardy and the failure of a bill of indictment to charge an offense) were "insubstantial" *(Abney,* Memorandum at 4, n.2). And, the government argues, if defendants are encouraged to believe that they can obtain pretrial appellate review of complex and close claims of any sort by tying them to insubstantial double jeopardy claims, the effect would be to encourage significant pretrial delay in criminal cases.[11]

When this argument is examined either in terms of the totality of federal criminal cases, or the *MacDonald* case in particular, the insubstantiality of this contention is apparent.

The government's contention requires an inquiry into the question of which federal criminal defendants

[11]The argument asserted by the government in speaking of *Abney* (*Barket,* Memorandum at 7, n.9), that "potential for delay caused by joining a colorable statutory claim to a frivolous double jeopardy claim is immense," should not be used by this Court by way of analogy for, again, such are not the facts of the present case.

are in a factual position to raise even the most specious double jeopardy claim.

Among the total number of federal criminal cases, only a very small percentage represents re-trials, either as a result of a new trial having been granted or because of a mistrial. And, review of the *MacDonald* case by this Court in no way answers the question of whether claims of double jeopardy, made under such circumstances, are substantial or not.

In the particular terms of the *MacDonald* case, the court of appeals had more than adequate grounds for recognizing the uniqueness of its facts. A case in which the United States has once charged an accused with murder, gone through a full military judicial proceeding which resulted in a finding that the charges were "not true," and then four and one-half years later attempted to prosecute the accused again in a civilian proceeding on these charges, is not likely to occur again. And, its occurrence, and consequent double jeopardy challenge, including interlocutory appeal, presents no real threat to the orderly disposition of the great mass of criminal cases.

In *Abney,* the appellate court entertained an interlocutory appeal of a claimed insufficiency in an indictment because it held the claim to be "pendent" to a double jeopardy claim. This is to be contrasted to the situation in the present case. While the court of appeals held that the respondent's speedy trial claim was pendent to his double jeopardy claim (Pet. App. B, 5a), both were adjudged independent claims of constitutional dimensions. The court of appeals, it

should be noted, had made an initial finding that this claim was not a frivolous one (Pet. App. C, 42a; see also Pet. App. B, 6a). No such finding was made in *Abney,* and none was possible under the facts. Thus, the government arguments articulated in *Abney* are misapplied to respondent's case.

b. The government also relies heavily on the arguments made by it in its memorandum in *Barket* as providing support for its request for certiorari in the *MacDonald* case. In *Barket,* the government memorandum acknowledges that the settled principle embodied in 28 U.S.C. §1291 is that an appeal *ordinarily* must await final judgment. *(Barket,* Memorandum at 6, emphasis supplied.) However, nowhere in its subsequent argument does the government acknowledge that any significance is to be attached to the corollary of this rule: that unusual circumstances require the remedy of an interlocutory appeal.[15]

The government also argues, in its *Barket* memorandum, that this Court's decision in *DiBella v. United States,* 369 U.S. 121 (1962), in effect is virtually an absolute bar to any pretrial appeal in criminal cases. Such an interpretation is erroneous.

[15]The government suggestion of the use of a writ of mandamus for review of erroneously rejected double jeopardy claims is ineffectual (*Barket,* Memorandum at 11). The rigidity of the rules pertaining to mandamus, even to obtain review of valid double jeopardy claims, is too great to be workable. 9 Moore's Federal Practice ¶ 110.01 (1975). When this Court decided *Cohen v. Beneficial Industrial Loan Corp., supra,* it was fully cognizant that mandamus was available as a potential remedy for issues that litigants sought to have reviewed on pretrial appeal. The Court, nevertheless, recognized the inadequacy of this writ and provided for an exception for limited numbers of pretrial appeals.

In *DiBella* the defendant sought to appeal pretrial the denial of his motion to suppress evidence. In rejecting his right to a pretrial appeal, this Court stressed that the constitutional guarantee of a speedy trial, when balanced against the right to an interlocutory appeal on this particular issue, was of a greater significance and required that such appeals not be allowed prior to verdict.

Further, there was present in *DiBella* the serious practical consideration of the effect of pretrial appeals from the denial of motions to suppress. Such motions are active possibilities in the overwhelming number of criminal cases. To allow pretrial appeals in such volume posed potential problems of delay in the trial of a great number of criminal cases. *DiBella* foreclosed such a possibility.

The opinion of the Court in *DiBella* emphasized that historical principles give highest priority to the trial of criminal cases without delay. The decision sought to put the finality rule into proper perspective as it relates to criminal cases. But, it also clearly acknowledged the need to maintain flexibility in the administration of the rule. As Mr. Justice Frankfurter stated in *DiBella:*

> Since the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions. Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the *damage of error unreviewed before the judgment is definitive and complete,* see *Collins v. Miller,* 252 U.S. 364, 370, *has been deemed greater*

than the disruption caused by intermediate appeal. 369 U.S. at 124 (Emphasis supplied).

The inflexible interpretation of *DiBella* urged by the government would bar absolutely all interlocutory appeals in criminal cases. It asks this Court to reject the modest flexibility described as necessary by Justice Frankfurter.

The government's argument also asks this Court to read *DiBella* as if it impliedly overruled the declaraton of this Court in *Cohen v. Beneficial Industrial Loan Corp., supra,* that there is a distinct and limited number of criminal cases in which in interlocutory appeals can be taken.[16]

The criteria set down by this Court in *Cohen* were specific and clear. The exception applies only to that "small class of claims of right which required appellate review before trial.[17] These rights were described by Mr. Justice Jackson as

> . . . separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent to be deferred until the whole case is adjudicated. The Court has long

[16]The suggestion in the government's memorandum in *Barket* (Memorandum at 9) that perhaps *Cohen* does not even apply to criminal cases is unsupported by the opinions of any lower courts. And, the government comes rather late to this suggestion in view of the twenty-seven-year history of this rule, which has been applied sparingly and with no significant interference with the movement to trial of criminal cases.

[17]Congress enacted 28 U.S.C. §1291 as part of its exercise of regulatory power over the appellate jurisdiction of federal courts. In the intervening years since the *Cohen* doctrine was announced it is significant to note that Congress has not found that the practical administration of this exception has created conditions requiring it to foreclose this limited right to interlocutory appeals in criminal cases.

> given this provision of the statute this practical rather than a technical construction. *Cohen v. Beneficial Industrial Loan Corp., supra,* at 547.

The government's contention that "once pretrial appellate review of double jeopardy claims is accepted, some courts may be quick to extend the practice beyond cases involving only that particular constitutional provision," is unsupported by the history of this exception. Rather, a fair reading of the cases can lead only to the conclusion that the appellate courts have severely restricted the use of the *Cohen* exception.[18]

This Court itself has reaffirmed that the emphasis in the application of this exception should be on a "practical rather than technical construction" to be given to the term "final judgment" found in the appeals statute.[19] It is clear that the Court has stressed to the lower courts the efficacy and justice of a pragmatic rather than a dogmatic approach in determining what is "final." The courts have acted within these limits and with restraint.

c. The court of appeals allowed Dr. MacDonald to pursue an interlocutory appeal on speedy trial

[18]*Gavino v. MacMahon,* 499 F.2d 1191 (2d Cir. 1974); *United States v. Beckerman,* 516 F.2d 905 (2d Cir. 1975); *Higgins v. United States,* 205 F.2d 650 (9th Cir. 1959); *Roberts v. United States District Court,* 339 U.S. 844 (1950); *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972); *United States v. King,* 482 F.2d 768 (D.C. Cir. 1973); *McSurley v. McClellan,* 426 F.2d 664 (D.C. Cir. 1970); *United States v. DiSilvio,* 520 F.2d 247 (3rd Cir.), *cert. denied,* 96 S. Ct. 447 (1975); *United States v. Barket, supra,* note 7.

[19]*Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555 (1962); *Brady v. Maryland,* 373 U.S. 83 (1963); *Hudson Distrib. Inc. v. Eli Lilly & Co.,* 377 U.S. 386 (1964); *Mills v. Alabama,* 384 U.S. 214 (1966).

grounds only after it had first determined that the claim was inextricably tied to his double jeopardy claim. It did not decide that a speedy trial claim alone or one linked with a double jeopardy contention automatically requires the allowance of an interlocutory appeal. Rather, the court made clear that it was only undertaking to decide the speedy trial issue because of the following special circumstances:

1. A decision on the double jeopardy issue involved deciding a matter that would have a general impact on military law. Rather than decide the case on broad grounds the court acted only on the narrower speedy trial claim. The court explicitly noted that it was motivated to do so because of a genuine sense of judicial restraint. (Pet. App. B, 5a.)

2. The court was persuaded to hear and decide the speedy trial claim because of the "extraordinary nature of MacDonald's case." *Id.* And, the court had only decided to do so after having made an initial determination, at the time that the appeal was filed, that the claim was meritorious. (Pet. App. C, 42a.)

The court of appeals carefully noted that it did not intend to allow the claim of denial of speedy trial to serve as an opportunity for defendants generally to take interlocutory appeals. Rather, the court noted:

> Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after judgment. (Pet. App. B, 5a.)

3. It was clear from the extensive record in the case that the court had before it all the facts on the

speedy trial issue that would have been presented to it if the appeal had been taken post-trial. (Pet. App. B.)[20]

Having taken the *MacDonald* case because it raised a serious and well-founded double jeopardy claim which was intertwined with a well-founded speedy trial claim and being impressed with the constitutional magnitude of the latter claim, the court acted appropriately in granting relief on that ground. The unique legal and factual context in which the issue arose justified the decision of the court of appeals to decide the speedy trial issue pretrial.

d. The extent to which the government has presented an illusory issue of interlocutory appeals to this Court, in its effort to actually obtain review on the merits of the speedy trial decision, is demonstrated by some data.

An inquiry made to the Division of Information Systems of the Administrative Office of the United States Courts revealed that the office no longer publishes figures on the number of interlocutory appeals taken to the courts of appeals. Such data were collected and published until 1970. Publication was discontinued thereafter, however, because of the small number of cases involved.

The figures for the year 1970, however, are of interest. In that year, a total of 291 applications were

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[20]Thus, the government's reading of *Barker, supra,* at 530-32 (1972), that an appellate review of a speedy trial claim is most effectively accomplished after a complete presentation of the facts has been already effectuated here. (Petitioner's Brief for Certiorari at 16.)

made for interlocutory appeals in *all* courts of appeals. The figure does not indicate, and data are apparently not available to show, what proportion of these cases were criminal matters.

e. Finally, it should be noted that even looking at the narrowest possible effect of a review by this Court of the speedy trial decision of the court of appeals, *i.e.,* its impact on *MacDonald* alone, such a review may well be of doubtful significance. In addition to his claim of denial of speedy trial, respondent has also a claim of double jeopardy which the court of appeals held was "not fanciful" (Pet. App. B, 6a). The court of appeals stated:

> In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded . . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . . . (Pet. App. B, 4a, n.3).

When it entered its judgment on the appeal later, the court stated, on the double jeopardy issue, that:

> In view of . . . our disposition of the case under the speedy trial provision of the Sixth Amendment, we find it unnecessary and imprudent to render an opinion (Pet. App. B, 28a).

If this Court should grant certiorari, beyond that, if this Court should thereafter reverse the decision,

the case will not be able to proceed to trial. Instead, the district court will have to reconsider the respondent's motion to dismiss because of double jeopardy/collateral estoppel in light of the expressed views of the court of appeals.

Because of all of these circumstances, the respondent's case is an inappropriate candidate for review by this Court on certiorari of the merits of the speedy trial determination of the court of appeals.

CONCLUSION

For all of the foregoing reasons, the respondent, Dr. Jeffrey R. MacDonald, respectfully submits that the Petition for a Writ of Certiorari should be denied.

August, 1976.

Respectfully submitted,

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No. 75-1892

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
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The government's petition stated that this case presents two unsettled issues of substantial importance in the area of criminal law: *first*, whether the Sixth Amendment right to a speedy trial is implicated during the period after charges against a defendant have been dismissed and he has been freed of all custodial restraints; and *second*, whether the courts of appeals have jurisdiction to hear interlocutory appeals by defendants in criminal cases. Respondent has chosen virtually to ignore the first issue and has alleged that the second—which this Court has already agreed to decide in another case—is insufficiently important to warrant review.

1. Although respondent devotes two pages (Br. in Opp. 23-25) to a discussion of what we believe to be the dispositive question in this case, the bulk of his

elaborate factual presentation is designed to demonstrate the correctness of the court of appeals' application of the factors set forth in *Barker* v. *Wingo*, 407 U.S. 514, for determining whether a defendant has been denied his Sixth Amendment right to a speedy trial. While we disagree with respondent's analysis of the Sixth Amendment issue, our fundamental disagreement with the approach of the court of appeals related not to the way in which it balanced the *Barker* criteria in the context of this case, but rather to its threshold determination that the Sixth Amendment guarantee of a speedy trial attaches to a person "not the subject of public accusation" (*United States* v. *Marion*, 404 U.S. 307, 321).[1] As we noted in the petition, this conclusion fosters none of the interests that the speedy trial provision was designed tc serve and leads to the anomalous result that the government must either bring to trial expeditiously a person against whom no charges are pending or forego entirely its power to prosecute for crimes. We suggested that the appropriate analysis of pre-indictment delay—even where charges have been initially preferred but thereafter dismissed—is one of due process under the Fifth Amendment, and that since respondent's indictment occurred within the applicable statute of limitations and—as he concedes (Br. in Opp.

[1]Since, in our view, the invalidity of the court of appeals' decision rests upon the resolution of this legal issue, we will refrain at this time from responding to the incomplete and distorted factual presentation in the brief in opposition. We note, however, that respondent's discussion underscores the facial inappropriateness of applying the *Barker* test to delays occurring prior to indictment and at a time when the defendant is under no pending criminal charges or other legal restraints. For example, respondent's persistent "desire to have the case resolved" and request "for a final decision on the matter" (Br. in Opp. 16) is hardly the equivalent of a defendant's demand that he be tried on pending charges. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 531-532.

13)—the delay was not "an intentional device to gain tactical advantage over the accused" (*United States* v. *Marion*, *supra*, 404 U.S. at 324), the case should have proceeded to trial.

Respondent's sole reply (Br. in Opp. 24-25) is that our contentions are foreclosed by *Klopfer* v. *North Carolina*, 386 U.S. 213. This is incorrect. As we have already noted (Pet. 21-22, n. 16), the distinction that the Fourth Circuit acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period" (Pet. App. 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* (see 386 U.S. at 221-222) and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Sixth Amendment provision. See 404 U.S. at 320. Unlike respondent, Klopfer formally remained "the subject of public accusation" during the period of delay. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532, n. 33, where the Court described Klopfer as "a defendant awaiting trial on bond."

Respondent's inability to rebut our essential argument is further illustrated by his unconvincing attempts to distinguish *United States* v. *Bishton*, 463 F. 2d 887 (C.A. D.C.). Although the period of delay in *Bishton* was unquestionably shorter than here, the salient fact—ignored by respondent—is that the District of Columbia Circuit refused to inquire into the length of or justification for the delay in determining whether the defendant's Sixth Amendment right to a speedy trial had been violated. Instead, because the defendant had not been under arrest or indictment during the three-month period in question, the court concluded, in reliance on *Marion*, that the delay was not cognizable under the

Sixth Amendment. 463 F. 2d at 891.[2] This approach is flatly inconsistent with the opinion below and, if followed here, necessarily would have produced a different result.[3]

2. No extended discussion is required to refute respondent's assertion (Br. in Opp. 25) that the importance of the interlocutory appeal question raised in this case is "illusory." This Court has already determined the issue to be of sufficient importance to warrant its attention (*Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976) and, if the position we urge in *Abney* ultimately prevails, it will follow *a fortiori* that the court below lacked jurisdiction to entertain respondent's appeal. If, on the other hand, the Court holds in *Abney* that the denial of a double jeopardy claim creates a

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[2]Contrary to respondent's assertion (Br. in Opp. 21), the pertinent three-month delay in *Bishton* did not result from a flaw in the indictment and the consequent choice of the incorrect forum in which to prosecute. Those factors had resulted in an earlier eight-month delay, which (because defendant had been under criminal charges at the time) the court of appeals did consider in assessing his speedy trial claim. 463 F. 2d at 890. The subsequent three-month delay—for which, the court of appeals noted, "the record supplies no explanation" (463 F. 2d at 891)—occurred after the dismissal of the initial indictment had been affirmed on appeal and before a new indictment was brought.

[3]By the same token, although respondent correctly notes (Br. in Opp. 23) that *United States* v. *Flores*, 501 F. 2d 1356 (C.A. 2), construed the district court's speedy trial rules rather than the Sixth Amendment (see Pet. 21, n. 15), he again overlooks the obvious importance to that case of the court of appeals' holding that the delay in indicting the defendant after a complaint against him had been dismissed was irrelevant in assessing whether he had been denied his right to a speedy trial. 501 F. 2d at 1359-1360. Respondent also offers no reason to believe that the court's analysis would have differed if it had been interpreting the constitutional provision, which the local rules were designed to implement.

unique circumstance justifying a limited exception to the general principle of non-appealability, there will still remain open the question whether that exception should extend to the denial of motions to dismiss the indictment because of other constitutional infirmities.[4] Those jurisdictional questions are squarely presented here—an assertion respondent does not contest—and they do not depend for their resolution on any of the "unique facts" or "extraordinary background" (Br. in Opp. 27) of this case.[5]

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[4]Respondent apparently urges both that the court of appeals asserted independent jurisdiction over his speedy trial claim (Br. in Opp. 29) and that the court's exercise of jurisdiction was merely pendent to its consideration of the double jeopardy issue (Br. in Opp. 33-35). In our view, the Fourth Circuit held that the Sixth Amendment claim was independently appealable prior to trial. Pet. 15, n. 11. If, however, it is determined that the court attempted only to assert pendent jurisdiction, this case raises the question, also presented in *Abney*, whether a court of appeals may consider claims other than double jeopardy if it has properly assumed jurisdiction to review a double jeopardy claim.

[5]We frankly fail to comprehend respondent's suggestion (Br. in Opp. 37) that a reversal of the court of appeals' judgment would only require further pretrial relitigation of his double jeopardy claim. The district court has already rejected that claim (Pet. App. 46a-47a), and nothing stated by the court of appeals—which expressly declined to consider the merits of respondent's double jeopardy argument (Pet. App. 28a)—requires a different result.

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BRIEF FOR THE UNITED STATES

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American Bar Association, *Standards Relating to Speedy Trial* (Approved Draft 1968)	62
Manual for Courts-Martial, United States (Rev. ed. 1969)	11, 52
S. Rep. No. 93-1021, 93d Cong., 2d Sess. (1974)	61, 62

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F.2d 196. The order of the court of appeals denying the government's petition for rehearing with suggestion for rehearing *en banc* (Pet. App. A) is unreported. The opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. D) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 29, 1976. The petition was filed on that date and was granted on June 20, 1977 (A. 215). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.

2. Whether the period after criminal charges against a defendant have been dismissed but before the same or related charges are reinstituted against him should be considered in determining whether the defendant has been deprived of his Sixth Amendment right to a speedy trial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

Respondent was charged with the first-degree murders of his wife and two daughters, in violation of 18 U.S.C. 1111, in an indictment returned on January 24, 1975, by a grand jury of the United States District Court for the Eastern District of North Carolina. On July 28, 1975, the district court denied respondent's motions to suppress evidence and to dismiss the indictment (Pet. App. 44a-50a). Respondent appealed, and the government moved to dismiss the appeal for lack of jurisdiction. On August 15, 1975 (three days before trial was scheduled to begin), the court of appeals entered an order permitting the appeal and staying respondent's trial (*id.* at 42a-43a). On January 23, 1976, the court of appeals reversed and remanded with directions to dismiss the indictment on the ground that respondent had been denied his Sixth Amendment right to a speedy trial (*id.* at 3a-28a).

1. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and his two daughters, Kimberly and Kristen, aged five and two, were bludgeoned and stabbed to death at respondent's quarters on the Fort Bragg military reservation in North Carolina. Respondent, a Captain in the Army Medical Corps assigned to the "Green Berets," telephoned the military police at 3:40 a.m. for assistance

(A. 146).[1] Clad only in blue pajama bottoms, respondent informed the police that he and his family had been attacked by four assailants (G-4, at 1), one of whom allegedly chanted, "Acid is groovy, kill the pigs" (A. 185).

Shortly thereafter, Army Criminal Investigation Detachment (C.I.D.) Duty Agent William F. Ivory arrived at the scene as respondent was being removed to the hospital. Agent Ivory walked through the apartment, observing the bodies and the blood stained walls and floors (E-21, at 632-637). He removed a torn and bloody blue pajama top that had been draped on the chest of respondent's wife and a Hilton bathmat that was resting on her abdomen (A. 165). Agent Ivory also observed the word "pig" written in Colette MacDonald's blood on the headboard of the bed in the master bedroom (A. 147; E-21, at 652)[2]

[1] The summarized testimony of the witnesses at the Article 32 hearing convened by the Army to investigate the crimes, prepared by the investigating officer, appears at A. 113-201. The verbatim transcripts are referred to as exhibits E-1 to E-57 in the index to this summary (A. 212-214). References to the verbatim record rather than to the summary will be cited by the pages of the transcript (*e.g.*, E-1, at 5). Government exhibits are referred to by the letter "G" and defense exhibits by the letter "D". These exhibits are indexed at A. 205-211.

[2] The word appeared to have been written by fingers incased in a rubber glove. A finger segment of a latex surgical glove bearing Colette's blood was later recovered from a crumpled sheet in the master bedroom. The second C.I.D. investigation, completed in June 1972 (see p. 11, *infra*), revealed that the finger segment was the same brand as the surgical gloves stored in the cabinet below the sink in respondent's kitchen (A. 165; C.I.D. Report of Investigation No. 71-C.I.D.011-00015, Vol. I, pp. 61-62, Ex. L-2).

and found in the living room a recent issue of *Esquire* magazine, featuring an article on the notorious Charles Manson murders of a few months earlier (G-65; G-85; G-100).

As the body of respondent's wife was being lifted from the floor of the master bedroom onto a stretcher, Agent Ivory noticed a blue thread adhering to a clot of blood on the rug where her head had rested. This discovery prompted a search by C.I.D. personnel for other blue threads and yarns inside and outside respondent's quarters. More than one hundred blue threads and yarns, identical to those of respondent's blue pajama top, were ultimately collected from various rooms and from the area immediately outside the house: more than 70, including approximately 30 from the spot where the body of respondent's wife had been found, were discovered in the master bedroom; 19 were uncovered from the bedding in which Kimberly's body had been wrapped; three were removed from Kristen's bedding; and two were taken from a wooden club lying just outside the utility room door. No threads were found in the living room, where respondent claimed that he had been violently attacked and that his pajama top had been torn (A. 163-166; E-3, at 400; E-21, at 657; G-7; G-20; G-21; G-22; G-24; G-26).

The bodies of respondent's wife and children were immediately autopsied (A. 160-162). Pathologists determined that although Colette and Kimberly had sustained severe blunt trauma injuries to the head before death, all of the victims had died from multiple

deep penetrating stab wounds.[3] It was also determined that respondent and each of the victims had a different blood type, thus facilitating the investigators' recreation of the murders and of respondent's movements through his apartment on the night of the crimes. Furthermore, C.I.D. agents and laboratory technicians engaged in a painstaking analysis of the crime scene over five continuous days, photographing, dusting, and collecting all real evidence found in respondent's quarters (G-98; D-25; D-26; D-27).

Respondent was interviewed by several law enforcement officers on the morning and afternoon following the murders. He reported that at least four intruders had entered his home, that the assailants had encountered him in his living room while he was asleep on the couch and had struck him with a bludgeon, that he had heard his wife and older daughter screaming but had lost consciousness, and that when he awoke he had found his family dead (G-76, at 1-5). Respondent also provided a detailed account of his actions upon discovering the bodies, including the statement that he had removed his pajama top and had covered his wife's body with it and with a Hilton towel (G-76, at 3; G-101, at 4-9).[4]

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[3] Respondent's wife had suffered 16 elliptical stab wounds and 21 puncture wounds to the chest (A. 160).

[4] An ice pick and a paring knife, which had been used to inflict many of the victims' wounds, were recovered from the back yard of the house; there were no fingerprints on either weapon (G-7, at 15). Subsequent analysis showed that a towel had been used to wipe those instruments and that

By April 6, 1970, after an intensive but incomplete investigation had been conducted, it had become apparent to C.I.D. agents that many aspects of respondent's version of the attack and of his actions after regaining consciousness were inconsistent with the preliminary laboratory analysis of the physical evidence. For example, although respondent alleged that he had been stabbed in the right chest, and although he had in fact suffered an incision and a partially collapsed right lung (A. 155),[5] there was no hole in the right front portion of his pajama top to correspond to that wound (G-74); although respondent had not sustained any stab wounds to his back (D-28), more than 30 punctures were visible on the rear panels of his pajama top (G-19); although respondent alleged that he had been violently assaulted in his living room (G-76, at 2; G-101, at 4), no seam threads or fabric yarns from his pajamas were uncovered in a minute, pile-by-pile examination of the living room rug (G-7; E-21, at 661); although respondent alleged that he had been attacked with a wooden club (G-101, at 1), no splinters from the club were found in the living room, despite the fact

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Colette and Kimberly MacDonald's blood was on the towel (G-7, at 6; G.J. Stombaugh 14-17). ("G.J. designates the testimony of the witnesses before the federal grand jury empaneled in August 1974 (see p. 12, *infra*), to which we refer to document the continuing progress of the investigation. We have relied only upon those portions of the grand jury proceedings that have been disclosed to respondent's counsel.

[5] The clean incision suffered by respondent was unlike the multiple, gaping and deeply penetrating knife stab wounds suffered by his wife and children (D-25 to D-28).

that such splinters were discovered in the bedrooms (E-21, at 400), nor was there any trace of blood on the couch, walls, floor or rug in the area of his alleged attack (G-7; G-24; E-8, at 447, 469-470); although respondent alleged that he had not been wearing his pajama top when he inspected Kimberly's body (G-101, at 7), the garment bore stains of Kimberly's blood (G-7); although respondent alleged that his pajama top had been torn in a struggle in the living room (G-101, at 4), the pocket of the pajama top was found near his wife's body in the master bedroom (E-21, at 660) with flecks of Colette's blood on it (G-7); although respondent alleged that he had not been wearing his eyeglasses either when assaulted or at any other time during the attack on his family (G-101), investigators found his glasses lying on the floor of the living room, with Kristen's blood on the surface of the lens touching the floor; and although respondent alleged that he had first discovered his wife's body in the master bedroom, a bare foot print in Colette's blood led from Kristen's room, where other traces of Mrs. MacDonald's blood were found on top of the bed and on an adjacent wall (G-8, at 4).[6]

Based on these and other discrepancies in his story and on additional evidence, respondent was advised of his rights by military authorities on April 6, 1970, and was warned that he was a suspect. Later that day, respondent's immediate commander, Col. Francis

[6] The impression made by the foot matched the dimensions of respondent's left foot (G-8, at 7).

B. Kane, Jr., relieved respondent of his medical duties and restricted him to the military reservation on condition that he be escorted by another officer when not in his quarters. Several weeks thereafter, on May 1, 1970, Col. Kane formally preferred criminal charges against respondent, pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 7a).

As required by Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832,[7] an Investigating

[7] Article 32, U.C.M.J., 10 U.S.C. 832, provides:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged

Officer, Col. Warren V. Rock, was appointed to investigate the matter and to recommend whether the charges (three specifications of murder, in violation of Article 118 of the U.C.M.J., 10 U.S.C. 918) should be referred by the General Court-Martial Convening Authority (the post commander) to a general court-martial for trial. At the hearing held pursuant to Article 32, the government presented 27 witnesses and respondent 29, the majority of whom were character witnesses. Respondent also testified, repeating his previous recollection of the events surrounding the murders (Pet. App. 7a-8a; A. 183-190).

At the conclusion of the Article 32 proceeding, Col. Rock filed a report recommending that the charges against respondent be dismissed but that further investigation of the crime be undertaken by the appropriate civilian authorities (Pet. App. 8a). This recommendation was forwarded to Maj. Gen. Edward M. Flanagan Jr., Commanding General of the unit to which respondent was assigned, who, on Oc-

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with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

tober 23, 1970, dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial (*ibid.*). See *Manual for Courts-Martial, United States* ¶ 33f (Rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship.

2. Following respondent's release from the military, the Department of Justice requested the Army to continue its investigation. During the ensuing year, the C.I.D. conducted a total of 699 interviews or reinterviews in 30 states and several foreign countries (Pet. App. 9a), the vast majority of which were undertaken for the purpose of locating persons who may have been the assailants of respondent and his family (A. 76-77). In addition to following leads furnished by respondent and others, the C.I.D. engaged in numerous forensic tests, including a comprehensive effort to identify all objects found at the scene of the crime (*e.g.*, hairs and fibers, fingerprints, paint, wood, knives, wax). These investigative efforts were recounted in a massive 13-volume report, which was transmitted to the Department of Justice in June 1972.[a] After the report had been examined by several persons within the Department, the C.I.D. was requested to investigate other undeveloped or newly-developed leads. Additional interviews and scientific tests were then conducted and the results incor-

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[a] Contrary to the court of appeals' statement (Pet. App. 9a), the C.I.D. report recommended not respondent's prosecution but rather further investigation (C.I.D. Report, *supra*, at 4, 151-153).

porated into supplemental reports forwarded on November 9, 1972, and August 30, 1973 (Pet. App. 9a).

In late May 1974, after further study, the government determined that many unanswered questions in the complex case could only be resolved by use of the broad investigative powers of the grand jury. Therefore, when its new term commenced in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was empaneled to investigate the murders fully. During the next several months, some 75 witnesses, including respondent, were called to testify. At the same time, the Federal Bureau of Investigation undertook an extensive reinvestigation of the crime, which included additional interviews and exhumation of the victims' remains to obtain hair samples.[9]

This renewed investigation led to a number of significant discoveries. It was determined, for example, that when respondent's pajama top was folded in the same manner in which it had been found on Colette MacDonald's body, the puncture holes in the garment corresponded to the ice pick wounds sustained by her chest (G.J. Stombaugh 27-31). In addition, the government learned for the first time that a crumpled and blood-soaked sheet found in the master bedroom near Colette's body bore bloody fabric im-

[9] The grand jurors also inspected respondent's quarters at Fort Bragg, where the murders occurred. These quarters were seized on February 17, 1970, and have remained sealed to this day.

pressions of her pajamas, suggesting that she had been carried while wrapped in the sheet (*id.* at 17-20). The sheet also bore fabric impressions in her blood left by respondent's torn pajama top (*id.* at 19-20). Neither discovery could be reconciled with respondent's repeated assertion that he had been wearing the top of his pajamas throughout the "hippies'" attack on his wife (A. 185-186; G-101, at 4; G.J. MacDonald Vol. II at 62-63, Vol. III at 18-20). In sum, the grand jury's inquiry established that there was probable cause to believe that respondent had killed his family and had staged the murder scene to cover up his crime (Pet. App. 7a, 9a).

3. Respondent was indicted for the murders on January 24, 1975. On July 28, 1975, the district court denied respondent's pretrial motions to dismiss the indictment on several grounds, including double jeopardy, pre-indictment delay, and denial of a speedy trial (Pet. App. 44a-50a).[10] Relying on *United States* v. *Marion*, 404 U.S. 307, the court concluded (*id.* at 49a) that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned."

[10] On May 30, 1975, the district court also denied respondent's motion for a change of venue to the Central District of California. The court of appeals dismissed respondent's appeal from this order (C.A. 4, No. 75-1621, decided July 1, 1975, certiorari denied, 423 U.S. 926) and denied his petition for a writ of mandamus to compel the district court to grant the change of venue (C.A. 4, No. 75-1681, decided July 15, 1975, certiorari denied, 423 U.S. 927).

The court of appeals, with one judge dissenting, reversed and remanded with directions to dismiss the indictment. Although recognizing that interlocutory orders in criminal cases are generally not appealable, the court, relying upon its decision in *United States* v. *Lansdown*, 460 F.2d 164, held that post-trial consideration of respondent's double jeopardy claim "could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial" (Pet. App. 5a). In addition, the court held that respondent's speedy trial claim was a proper subject for interlocutory review because it involved "a fundamental constitutional right," was "[p]endent to the double jeopardy claim, and closely related to it," and could "be decided without considering the merits of the charges against [respondent]" (*ibid.*).[11]

On the merits, the majority concluded that respondent had been denied his Sixth Amendment right to a speedy trial. The court viewed Col. Kane's preferral of criminal charges against respondent in May 1970, and the contemporaneous restriction of respondent's liberties, as "the functional equivalent of a civilian arrest warrant" (Pet. App. 13a-14a). It

[11] The court also ruled that, in view of its acceptance of the appeal on the double jeopardy and speedy trial issues, it would consider as well the other questions that respondent had sought to appeal (composition of the grand jury, pre-indictment delay, alleged prosecutorial misconduct, discovery, and suppression of evidence), since those questions "if not now presented, might occasion further delay in terminating this litigation" (Pet. App. 4a, n. 3).

concluded that the protections afforded by the Sixth Amendment were activated as of that date and that the delay of more than four and one-half years between respondent's accusation and his indictment was of sufficient length to require application of the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (Pet. App. 13a-20a). Although the court of appeals acknowledged that the government had not deliberately delayed in order to hamper the defense, it nevertheless determined that at least two years of the delay were attributable to "indifference, negligence, or ineptitude" (*id.* at 23a), that respondent had "consistently expressed a desire to have the case resolved" and had "reasonably asserted his right to a speedy trial" (*id.* at 24a), and that respondent had been prejudiced by the delay because he "has had to live with the constant threat of a new prosecution," "has been required to retain counsel at his own expense, and * * * has suffered anxiety concerning the unresolved nature of the case" (*id.* at 25a). Finally, the court stated (without specifying particulars) that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*ibid.*).

Judge Craven dissented. He disputed the court's conclusion that respondent had been subjected to the civilian equivalent of an arrest in May 1970, finding that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither

of which "warrants an application of the sixth amendment's speedy trial guarantee" (Pet. App. 32a). In any event, Judge Craven reasoned, since all military charges against respondent had been dismissed in October 1970, and since respondent had "stood under no 'public accusation'" or other disability during the four-year period prior to his indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment was unsupportable (*id.* at 32a-38a).

Judge Craven viewed respondent's claim as one of pre-indictment delay, which he found unpersuasive in the absence of concrete evidence of actual prejudice to respondent (Pet. App. 40a-41a). He noted that it had not been "suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew" (*id.* at 41a) and that, in any event, the question of whether prejudice may have resulted from the passage of time between the crime and indictment "[c]ertainly * * * need not be anticipated, and could best be left for determination at trial" (*ibid.*).[12]

SUMMARY OF ARGUMENT

I

The threshold question in this case is whether the order denying respondent's motion to dismiss the in-

[12] On April 30, 1976, the court of appeals denied the government's petition for rehearing *en banc* by a 3-3 vote (Pet. App. 2a).

dictment on speedy trial grounds was appealable before trial. We submit that it was not.

A. Under the controlling jurisdictional statute, 28 U.S.C. 1291, the courts of appeals may review only "final decisions" of the district courts, a phrase that the courts have consistently construed to bar "piecemeal" appeals before final judgment. Indeed, as the Court recently observed in *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, slip op. 5, quoting from *DiBella* v. *United States*, 369 U.S. 121, 126, "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" The pretrial denial of a defendant's motion to dismiss an indictment on speedy trial grounds is not "final," since it does not terminate the criminal proceedings in the district court; the ruling merely allows the case to proceed to trial, where a number of other factors may lead to dismissal of the charges or where, if the case goes to verdict, the jury may acquit. A speedy trial violation is simply one reason why there should be no judgment of conviction.

B. Nor is the pretrial denial of a speedy trial motion immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547. Although the Court recently applied the "collateral order" doctrine in *Abney* to permit appeal prior to trial of the district

court's rejection of a double jeopardy claim, it stressed that three factors must be met before a departure from the normal rule of finality in criminal cases will be tolerated: the district court's order must constitute a "complete, formal and final rejection" of the defendant's claim, the claim must be wholly "separable from, and collateral to," the principal issue at the defendant's trial, and the claim must involve a right that would be "lost, probably irreparably," if appellate review had to await final judgment. Speedy trial claims satisfy none of these requirements.

Unlike a motion to dismiss an indictment on double jeopardy grounds, which generally raises purely legal questions fully capable of a final resolution before trial, the determination of speedy trial claims requires a delicate assessment of a number of factual issues, the most significant of which is often the prejudice suffered by the defendant on account of the delay. These determinations normally are not possible in advance of trial. Until the government's case has been presented and the precise factual allegations that the defendant must counter are known, the district court cannot intelligently decide whether evidence claimed to have been lost, or witnesses whose memories have allegedly faded, would have materially aided the defense. For these reasons the pretrial denial of a speedy trial motion is always subject to reconsideration during or after trial and can never be considered a final rejection of the claim.

Speedy trial claims also implicate matters that are not wholly separable from the merits of the impending trial. The thrust of a defendant's Sixth Amendment contention in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crimes charged. Only after the trial has taken place is this assertion truly meaningful: not only is an assessment of prejudice more easily accomplished at that stage, but also, if the jury acquits, it is apparent that the defendant has not been prejudiced at all.

Finally, and of most importance, there is no justification for allowing an exception to the beneficial rule against piecemeal appeals in criminal cases for speedy trial claims, because such claims can be fully adjudicated after trial. By contrast to the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not encompass a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. It is the delay *before* trial, not the trial itself, that offends the constitutional guarantee of a speedy trial. Thus, proceeding with the trial after a defendant's Sixth Amendment claim has been rejected by the district court would not cause or compound the deprivation, and the constitutional protection can be completely vindicated by the reversal of any conviction procured after a period of unconstitutional delay.

C. Perhaps occasional delay might seem an acceptable price to pay for ensuring the expeditious resolution of valid speedy trial claims. Common sense in-

dicates, however, that the district courts properly resolve the vast majority of such claims. Hence, the price for correcting a relatively few errors before trial would be delay in the overwhelming number of cases in which defendants have appealed from correct decisions—and it would be the rare defendant, interested in postponing his trial for tactical reasons, who could not fashion a colorable speedy trial argument. Moreover, some assertions of delay-caused prejudice to a defendant, validly rejected when first presented, would become self-fulfilling prophecies as memories dim or evidence is lost during the period necessary for review.

This result would seriously frustrate the goal that the Speedy Trial Clause is designed to achieve—the prompt disposition of criminal charges—a goal that is as much designed to foster the interests of society as to confer protection upon individual defendants. The prudent course, therefore, is to minimize pretrial delay by requiring a defendant whose speedy trial motion has been denied by the district court to proceed to trial, not to encourage further delay by countenancing protracted interlocutory appeals.

II

If the Court concludes that the denial of respondent's speedy trial motion was properly appealable prior to trial, then the judgment of the court of appeals must be reversed on the merits. The Court's holding that respondent was denied his Sixth Amendment right to a speedy trial rests on the erroneous

assumption that the protections afforded by the Speedy Trial Clause continue to run after charges against a defendant have been dismissed. We submit that an extension of the Sixth Amendment to the period during which an individual is no longer the subject of public accusation is both unwarranted and unwise.

A. This Court has observed on several occasions that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections" of the Speedy Trial Clause. *United States* v. *Marion*, 404 U.S. 307, 320. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5. This is true because a person who has been formally accused of a crime has a substantial interest in an expeditious disposition of the charges.

Inordinate delay between accusation and trial may prejudice the accused's ability to mount a successful defense. Moreover, "[a]rrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States* v. *Marion*, *supra*, 404 U.S. at 320. Once the government has set the criminal process in motion, with these inevitable consequences, it assumes a duty, imposed by the Sixth Amendment, to bring the accused to trial with a minimum of delay.

These considerations have little application to a period during which no formal criminal charges ex-

ist. While not under arrest or indictment, "a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, *supra*, 404 U.S. at 321. Moreover, the government obviously cannot be required to dispose swiftly of criminal charges against an individual when no such charges are outstanding. For this reason the Court declined in *Marion* to apply the Speedy Trial Clause to the period before formal accusation. It is the logical corollary of this conclusion that the protections of the Clause are equally inapplicable after criminal charges have been formally dismissed. At that point the individual no longer stands officially accused of wrongdoing, his liberty is in no way restricted, and there are no pending charges on which a speedy trial could be held.

B. The court of appeals' construction of the Speedy Trial Clause also would have significant adverse effects on the administration of the criminal law. It is not uncommon for charges to be dropped after arrest or indictment as a matter of prosecutorial discretion, either because the evidence at that stage may not be sufficient to establish guilt beyond a reasonable doubt or because of non-evidentiary considerations properly a part of the decision to prosecute. Such dismissals are beneficial to all concerned: the defendant is spared the emotional and financial cost of a trial, with its risk of conviction, while the government, the courts, and society in general are saved

the expense associated with an unnecessary or unwise utilization of the criminal justice system.

The incentive to follow this sound course would be substantially diminished if, by declining to prosecute a defendant once his speedy trial rights had been triggered by arrest or indictment, the government might forfeit its ability ever to bring the accused to trial. Congress has recognized as much in the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, which expressly excludes from the computation of a defendant's speedy trial time any period of delay between the dismissal of an indictment or information by the government and the filing of a new charge against the accused for the same offense. 18 U.S.C. (Supp. V) 3161(h)(6). This rule advances the interests protected by the Speedy Trial Clause and, in our view, reflects the proper interpretation of the constitutional provision.

ARGUMENT

I. A PRETRIAL ORDER DENYING A DEFENDANT'S MOTION TO DISMISS AN INDICTMENT ON SPEEDY TRIAL GROUNDS IS NOT APPEALABLE BEFORE TRIAL

A. Introduction

The decision of the court of appeals to review respondent's speedy trial claim prior to trial is unprecedented. We are aware of only two other federal cases in which a defendant has sought pretrial appellate review of an order denying his motion to dismiss the indictment because of an alleged

violation of the Sixth Amendment right to a speedy trial, and in both instances the court of appeals held that it lacked jurisdiction to consider the claim prior to conviction. See *United States* v. *Bailey*, 512 F. 2d 833 (C.A. 5), certiorari dismissed, 423 U.S. 1039; *Kyle* v. *United States*, 211 F. 2d 912 (C.A. 9).

The court below offered two grounds to justify its assumption of jurisdiction. First, it observed that respondent also challenged the district court's denial of his motion to dismiss the indictment on double jeopardy grounds, a matter the court had previously held to be a proper subject for interlocutory appellate review (see *United States* v. *Lansdown*, 460 F. 2d 164 (C.A. 4)), and that respondent's Sixth Amendment claim was "pendent" and "closely related" to the double jeopardy claim (Pet. App. 5a). But this rationale is vitiated by *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, slip op. 11, which expressly held that the courts of appeals are without "pendent jurisdiction" over otherwise nonappealable claims even though they may be joined with a double jeopardy claim over which the courts of appeals do have interlocutory appellate jurisdiction. See also *United States* v. *Cerilli*, C.A. 3, No. 77-1200, decided July 15, 1977, slip op. 5-6.[13]

[13] The court of appeals' reliance on a theory of "pendent jurisdiction" is particularly difficult to accept in view of its failure to decide respondent's double jeopardy claim (Pet. App. 28a).

Alternatively, although conceding that "[n]ot every speedy trial claim * * * merits an interlocutory appeal" (Pet. App. 5a), the court of appeals believed that it could review the Sixth Amendment contention in this case because of its "extraordinary nature," in order to spare the district court and the parties "the burdens * * * of a prolonged, expensive trial * * *" (*id.* at 5a, 6a). This contention also is unpersuasive, however, because "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405. The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute, 28 U.S.C. 1291, the courts of appeals have the power to review only "final decisions," a concept Congress defined "in terms of categories" (354 U.S. at 405).

Thus, whether the order rejecting respondent's motion to dismiss his indictment on speedy trial grounds is an appealable "final decision" depends upon whether such orders, "in the generality of cases" (*Carroll* v. *United States*, *supra*, 354 U.S. at 405), fall within that well-defined and narrowly circumscribed category of interlocutory orders for which the "costs of piecemeal review on the one hand [are outweighed by] the danger of denying justice by delay on the other." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171, quoting from *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (footnote omitted).

B. The Denial Of A Motion To Dismiss An Indictment On Speedy Trial Grounds Is Not A "Final Decision"

This Court has recently reiterated that "there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and the courts have consistently given effect to that policy." *Abney* v. *United States*, *supra*, slip op. 5.[11] Indeed, the Court noted, "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Ibid.*, quoting from *DiBella* v. *United States*, 369 U.S. 121, 126. See also *Cobbledick* v. *United States*, 309 U.S. 323, 324-326.

This Court has accordingly declined to permit interlocutory appeals from orders denying motions to suppress evidence (*Cogen* v. *United States*, 278 U.S. 221), rejecting claims of statutory immunity from prosecution (*Heike* v. *United States*, 217 U.S. 423), and refusing to dismiss an indictment for failure to state an offense (*Abney* v. *United States*, *supra*, slip op. 11) or for lack of jurisdiction (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21). In each instance the Court stressed the absence of the statutory

[11] We have previously discussed the substantial historical underpinnings of this policy against interlocutory review in criminal cases (see pp. 19-37 of the government's brief in *Abney* v. *United States* (No. 75-6521), a copy of which we are providing to respondent), and we accordingly will not repeat this material here.

requirement of a "final decision" (28 U.S.C. 1291), which "in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. See also *Parr* v. *United States*, 351 U.S. 513, 518. These same considerations govern here. The pretrial denial of a defendant's motion to dismiss an indictment on speedy trial grounds obviously is not "final," since it does not terminate the criminal proceedings in the district court; the ruling merely allows the case to proceed to trial, where a number of other factors may lead to a dismissal of the charges, or where, if the case goes to verdict, the jury may acquit. A speedy trial violation is merely one reason why there should be no judgment of conviction.

C. Pretrial Decisions Rejecting Speedy Trial Claims Are Not Within The "Collateral Order" Exception To The Final Judgment Rule

This Court has twice departed in criminal cases from the general prohibition against piecemeal appellate review, invoking on both occasions the so-called "collateral order" exception to the final judgment rule, first announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547. *Cohen* was a stockholder's derivative action brought in federal court because of diversity of citizenship. Before trial the question arose whether a state statute requiring the plaintiff to post security applied in federal court. The district court thought not, and the defendants immediately appealed; the court of appeals reversed and ordered the posting of security.

This Court concluded that the court of appeals had properly assumed jurisdiction to review the trial judge's ruling.

The Court began by reaffirming the settled principle that there can be no appeal before trial, "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (337 U.S. at 546). It concluded, however, that an order to post security was a "final decision" within the meaning of 28 U.S.C. 1291.

First, the district court's order had fully disposed of the question of the applicability of the state security requirement in federal court; in no way had the trial judge's ruling left the matter "open, unfinished or inconclusive" (337 U.S. at 546). Second, the decision was not simply a "step toward final disposition of the merits of the case [which would] be merged in final judgment" (*ibid.*); to the contrary, the order had nothing to do with the substantive issues in the litigation and could not have been reviewed on appeal after trial. Finally, the decision involved an important right that would be "lost, probably irreparably" (*ibid.*), if review had to await final judgment; appellate review, to be effective, had to be immediate. In sum, the Court determined that the security order fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*ibid.*).

Two years after its decision in *Cohen*, the Court applied the "collateral order" doctrine in a criminal proceeding, holding that an order denying a motion to reduce bail could be reviewed prior to trial. *Stack* v. *Boyle*, 342 U.S. 1. Concurring in the decision, Mr. Justice Jackson explained that, like the question of posting security in *Cohen*, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all" (*id.* at 12). And again last Term, the Court held that the "collateral order" doctrine permits interlocutory appeal of orders denying a pretrial motion to dismiss an indictment on double jeopardy grounds. *Abney* v. *United States*, *supra*, slip op. 7. Such orders, said the Court, "constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee" (*ibid.*). Moreover, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*id.* at 8). And perhaps most important,

"the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" (*id.* at 9). Although the protection against being twice convicted for the same crime could "be fully vindicated on an appeal following final judgment," the Court explained, the Double Jeopardy Clause also "protects an individual against more than being subject to double punishments. It is a guarantee against being twice put to *trial* for the same offense" (*ibid.*):

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. [*Id.* at 10.]

Like the denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review" (*Abney* v. *United States*, *supra*, slip op. 7). Hence, if such orders may be appealed prior to trial, it must be because they satisfy the restrictive qualifications identified in *Cohen* and *Abney* as sufficient to justify dispensing with the normal rules against piecemeal review before final judgment. As we now show, application of the various factors underlying the "collateral order" doctrine convincingly demonstrates that speedy trial contentions are not within that "small class" of claims that are wholly distinct and separable from the main action and that must be determined immediately if there is to be meaningful appellate review.

1. *Pretrial denial of a speedy trial motion does not constitute a "complete, formal and final rejection" of the claim in the district court*

The threshold requirement for application of the "collateral order" doctrine is "a fully consummated decision" in the district court. *Abney* v. *United States*, *supra*, slip op. 7. The Court found this requirement satisfied in the case of a double jeopardy claim because such a claim generally raises purely legal questions that are capable of a definitive resolution without awaiting introduction of the evidence at trial; in addition, once the claim is rejected, "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Ibid.*

The same cannot be said of the denial of a pretrial motion to dismiss an indictment on speedy trial grounds. Speedy trial issues necessarily depend for

their resolution upon a delicate assessment of the particular facts of each case. They therefore are ordinarily best considered in the context of the entire proceeding. Events at trial may demonstrate that a speedy trial claim, although initially denied, has substantial merit and should be reconsidered prior to or after verdict.

In *Barker* v. *Wingo*, 407 U.S. 514, the Court listed four factors that must be weighed in determining whether an accused has been deprived of his Sixth Amendment right to a speedy trial: the length of the delay, the reason for the delay, whether the defendant has asserted his right, and the prejudice to the defendant from the delay. *Id.* at 530. Of the kinds of prejudice that the speedy trial guarantee is designed to prevent—lengthy and oppressive pretrial incarceration, the anxiety and disruption of personal affairs caused by public accusation of criminal wrongdoing, and the possible impairment of the ability to present an effective defense at trial—"the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* at 532.

Before trial, an appraisal of the degree to which post-accusation delay may have impaired defense capabilities often is extremely speculative. See *United States* v. *Ewell*, 383 U.S. 116, 122. Until the government's case has been presented and the precise evidence that the defendant must counter is known, the district court cannot intelligently determine whether

evidence claimed to have been lost as a result of the delay would have materially aided the defense. Evidence that appears vital prior to trial may assume diminished importance as the events at trial unfold; conversely, evidence whose value is debatable in advance of trial may become critical in light of the government's contentions. Prejudice once thought irreparable may also disappear if the evidence available to the defense, despite any trial delay that has occurred, is nonetheless sufficient to persuade the jury that the government has not proven the defendant's guilt beyond a reasonable doubt. Similar considerations apply to pretrial claims that the passage of time has dulled the memories of important defense witnesses. Not until the court has had an opportunity to observe the witness testify under oath at trial can it reliably conclude whether he in fact is unable to recall pertinent events and, if so, whether the lack of recall may fairly be attributed to the delay in commencing the trial.

In these circumstances, a district court's refusal in advance of trial to dismiss an indictment on speedy trial grounds (except perhaps on the rare occasions when the other factors in the *Barker* calculus by themselves conclusively establish a constitutional violation),[15] is always expressly or impliedly premised on the assumption that it would reconsider its ruling should the defendant's claim of prejudice be substantiated by the evidence or should unforeseen instances

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[15] See, *e.g.*, *Moore* v. *Arizona*, 414 U.S. 25, 26.

of prejudice to the defense materialize at trial. See, *e.g.*, *United States* v. *Roberts*, 548 F. 2d 665, 667 (C.A. 6), certiorari denied, No. 76-6299, May 23, 1977. Pretrial denial of a speedy trial claim thus can never be considered "a complete, formal and * * * final rejection" of the defendant's contention by the trial court; because of the unique nature of such claims, the matters preliminarily litigated in the motion to dismiss necessarily remain "open, unfinished [and] inconclusive" until the prosecution has run its course. *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546.[16]

2. Speedy trial claims do not implicate matters wholly "separable from, and collateral to," the principal issue at the defendant's trial

Closely tied to the "threshold requirement of a fully consummated decision" is the requirement that the issue sought to be litigated on appeal before trial be divorced from the main cause of action. For example, the bail reduction order in *Stack* v. *Boyle*, *supra*, was wholly unrelated to the validity of the criminal charges pending against the defendant. So, too, was the double jeopardy claim in *Abney*, which was "completely independent of [the defendants'] guilt or inno-

[16] See *DiBella* v. *United States*, *supra*, 369 U.S. at 129, holding that an order granting or denying a pretrial motion to suppress evidence allegedly procured through an illegal search and seizure was not immediately appealable, because "the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light."

cence" (slip op. 8). As we have previously explained, however, the question of prejudice to the conduct of the defense, which is so often central to an assessment of a speedy trial claim, is inextricably bound to, and therefore cannot properly be considered in isolation from, the events at trial.

This Court's insistence that interlocutory appellate review be confined to claims that are "separable from, and collateral to," the matters to be resolved at trial serves the important purposes of avoiding piecemeal appeals or unnecessary appellate consideration of issues that may be merged in, or mooted by, the final judgment. Pretrial review of speedy trial claims would frustrate both goals.

A district court's rejection prior to trial of a motion to dismiss an indictment on speedy trial grounds is ordinarily not a "fully consummated decision," because the denial is, as noted above, always subject to reconsideration if (as is frequently the case) the evidence at trial permits a more informed judgment to be made. An appellate court obviously would be in no better position than the district court to determine before trial whether delay has materially harmed the defendant.[17] Moreover, because the absence of con-

[17] Thus, in assessing respondent's Sixth Amendment arguments in the absence of a trial record, the court of appeals was forced to speculate in a vacuum about the "potential memory loss" attributable to the delay, which it regarded (for reasons that, at a trial, might have proven frivolous) as "critical" to respondent's defense (Pet. App. 26a).

The importance of events at trial to allegations on appeal of unconstitutional pretrial delay is demonstrated by the fre-

crete proof of prejudice prior to trial should lead with few exceptions to an affirmance of the district court's denial of the dismissal motion, the courts of appeals would often be faced with the identical Sixth Amendment claim (albeit with a more detailed factual predicate) on appeal from a resulting conviction. Hence, allowance of interlocutory review in this situation, rather than facilitating a determination, once and for all, of legal issues thought too important and distinct to await the termination of the trial, would spawn duplicative litigation.

Even if the element of prejudice could be reliably determined in advance of trial in all cases, speedy trial claims would nevertheless not be sufficiently independent of the outcome of the trial itself to warrant pretrial appellate review, because such claims, if meritorious, would be vindicated by an acquittal resulting from the prosecution's failure to carry its burden of proof. This Court was persuaded that the double jeopardy motion in *Abney* was separable from the issues at trial because "[t]he elements of that

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quency with which this Court and the courts of appeals have relied on the trial record to decide such claims. See, *e.g.*, *Barker* v. *Wingo*, *supra*, 407 U.S. at 534; *United States* v. *Jackson*, 542 F.2d 403, 409 (C.A. 7); *United States* v. *Graham*, 538 F.2d 261, 265 (C.A. 9), certiorari denied, 429 U.S. 925; *United States* v. *Crow Dog*, 532 F.2d 1182, 1193-1194 (C.A. 8), certiorari denied, No. 75-1843, March 21, 1977; *United States* v. *Jones*, 524 F.2d 834, 852 (C.A.D.C.); *United States* v. *Gavic*, 520 F.2d 1346, 1349 (C.A. 8); *United States* v. *Baumgarten*, 517 F.2d 1020, 1025 (C.A. 8), certiorari denied, 423 U.S. 878; *Morris* v. *Wyrick*, 516 F.2d 1387, 1391 (C.A. 8), certiorari denied, 423 U.S. 925.

claim are completely independent of [an accused's] guilt or innocence" (slip op. 8). And so they were, since an acquittal would not have eliminated the defendant's grievance. By contrast, a principal, if not the predominant, interest served by the Speedy Trial Clause is the protection of the integrity of the fact-finding process at trial; the thrust of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crimes charged.[18]

Only after the trial has taken place is that contention truly meaningful: if the defendant is acquitted, the claim is extinguished; if he is found guilty, the claim merges into the final judgment, can adequately be reviewed on appeal from the conviction, and (as we show below) can be fully satisfied by a reversal. In neither case can the claim be considered wholly

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[18] The courts have recognized this important distinction between double jeopardy and speedy trial claims in the disparate treatment accorded the contention that such claims are waived by a plea of guilty. While a guilty plea does not preclude subsequent assertion on appeal of a double jeopardy claim (*Menna* v. *New York*, 423 U.S. 61), since that claim is "not logically inconsistent with the valid establishment of factual guilt and * * * stand[s] in the way of conviction, [even] if factual guilt is validly established" (*id.* at 63, n. 2), it has been held that a defendant's formal admission of guilt waives defects such as the denial of a speedy trial. See, *e.g.*, *United States* v. *O'Donnell*, 539 F.2d 1233, 1236-1237 (C.A. 9), certiorari denied, 429 U.S. 960; *Speed* v. *United States*, 518 F.2d 75, 77 (C.A. 8), certiorari denied *sub nom. Camp.* v. *United States*, 423 U.S. 988; *Karcher* v. *Wainwright*, 476 F.2d 179, 180 (C.A. 5); *United States* v. *Mann*, 451 F.2d 346, 347 (C.A. 2).

separate and distinct from the main cause of action in the sense that it will not "affect, or * * * be affected by, decision of the merits of [the] case." *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546. Rather, "it goes to the very heart of the issues to be resolved at the upcoming trial." *Abney* v. *United States*, *supra*, slip op. 12.

3. Speedy trial claims do not involve a right that would be "lost, probably irreparably," if review had to await final judgment

Even if a district court order constitutes a "fully consummated decision" on an issue that is "separable from, and collateral to" the main cause of action, pretrial appellate review is inappropriate unless the ruling involves "an important right which would be 'lost, probably irreparably,' if review had to await final judgment * * *." *Abney* v. *United States*, *supra*, slip op. 7. In the absence of such extraordinary circumstances, there is no justification for countenancing a breach of the beneficial rule against interlocutory appeals in criminal cases, with the substantial systemic costs that disregard of the rule inevitably entails. The double jeopardy claim in *Abney* satisfied this essential condition, because that constitutional guarantee "assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense" (*id.* at 9-10). Therefore, "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the

clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs" (*id.* at 10; emphasis in original).

Loss or impairment of the right to a speedy trial, on the other hand, can never be attributable to the unavailability of pretrial appellate review of the claim. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not encompass a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the pertinent factors coalesce to deprive an accused of his right to a speedy trial, that loss has occurred before the claim is aired in any tribunal. While it may not be possible to identify with precision at what point the loss occurs, by definition it must occur *before* trial. Accordingly, proceeding with the trial would not cause or compound the deprivation.

Of course, an accused who successfully establishes a speedy trial claim prior to trial will not be tried. But this fact does not suggest that the Speedy Trial Clause embodies a prohibition against the trial itself. While the Court has held that the remedy for a violation of a defendant's right to a speedy trial is dismissal of the charges (*Strunk* v. *United States*, 412 U.S. 434, 440), this has been because the damage from an unconstitutional pretrial delay is irreparable (and, hence, any trial held after such delay would be an academic exercise from which no valid con-

viction could result), rather than because proceeding with the trial would independently infringe rights protected by the Sixth Amendment. Indeed, the Court has acknowledged the imprecision of the dismissal remedy in speedy trial cases, observing that the sanction is "unsatisfactorily severe" but that "it is the only possible remedy." *Barker* v. *Wingo*, *supra*, 407 U.S. at 522. This is often the case. For example, a defendant who secures a pretrial dismissal because he was granted immunity from prosecution, his indictment is defective, or the only evidence against him was seized in violation of the Fourth Amendment, also escapes trial. But it cannot therefore be said that that defendant enjoys a "right not to be tried," which must be safeguarded by interlocutory appellate review. See *Abney* v. *United States*, *supra*, slip op. 11; *Cogen* v. *United States*, *supra*, 278 U.S. at 227; *Heike* v. *United States*, *supra*, 217 U.S. at 430.[19]

By the same token, the effectiveness of appellate review is not diminished by awaiting the outcome of the proceedings in the district court. No remedy, whenever offered, can undo or alleviate the oppressive pretrial incarceration or prolonged period of anxiety that an accused may have suffered between

[19] As we have explained in our brief in *Abney* (pp. 42-44), the conclusion that the Speedy Trial Clause creates a "right not to be tried," and requires recognition of a concomitant right to pretrial appellate review to assure that the Sixth Amendment guarantee is not abridged, would be illimitable, since numerous other constitutional rights are also enforced by dismissal of the indictment.

indictment and trial, while the interest in avoiding conviction based on lost evidence or dimmed memories can be fully protected by a reversal of any conviction procured after a period of unconstitutional delay.[20] See *Abney* v. *United States*, *supra*, slip op. 9 (the aspect of "the Double Jeopardy Clause [which] protects an individual against being twice convicted for the same crime * * * can be fully vindicated on an appeal following final judgment"). And as a sanction to deter government proscrastination in future cases, the dismissal remedy is effective regardless of when it is imposed. Thus, precluding immediate review of a rejected speedy trial claim "presents a question, not of rights, but of remedies." *United States* v. *Calandra*, 414 U.S. 338, 354.

It is no answer to these significant considerations to suggest, as did the court below (Pet. App. 6a), that a pretrial appellate determination of a defendant's speedy trial claim might eliminate the necessity to hold a time-consuming and expensive trial. This Court has never regarded the possible avoidance of a needless trial as a sufficient justification for departure from the final judgment rule. See *Parr* v. *United States*, *supra*, 351 U.S. at 519-520; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325-326. In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, for example, the defendants in a criminal

[20] Indeed, appellate consideration of speedy trial questions prior to trial, rather than securing the interests protected by the Sixth Amendment guarantee, is far more likely to undermine those interests. See pp. 42-47, *infra*.

antitrust case pleaded that the district court lacked jurisdiction and that they were immune from prosecution. When the court rejected the plea, the defendants sought mandamus. This Court conceded that there may be enormous costs in taking part in a trial that never should occur, but it held that interlocutory review nonetheless was not allowed by statute (319 U.S. at 30):

> Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable.

What is more, the court of appeals' rationale for permitting pretrial appeals obviously could not logically be limited to speedy trial claims, but would encompass any other motion to dismiss an indictment or motion in bar—and would therefore effectively eviscerate the final judgment rule.

D. Interlocutory Appeals From The Denial Of Speedy Trial Motions Should Be Especially Disfavored Because They Would Frustrate Rather Than Promote The Values Reflected In The Speedy Trial Clause

Our discussion to this point has shown that, applying the principles enunciated in *Cohen* and *Abney*, the denial of a motion to dismiss an indictment on speedy

trial grounds is not a "collateral order" that may be appealed prior to trial.[21] Even were this conclusion less clear, the important policy considerations that underlie both the Speedy Trial Clause and the statutory bar to piecemeal appeals in criminal cases strongly suggest that speedy trial motions are the least appropriate subject for interlocutory appellate review.

This Court has recognized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *DiBella* v. *United*

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[21] Although the court of appeals analyzed the delay between 1970, when the crimes in this case were committed and the military proceedings involving respondent were held, and January 1975, when respondent was indicted, in terms of Sixth Amendment principles, in our view the proper inquiry is one of due process under the Fifth Amendment. See pp. 63-70, *infra*. Proper designation of the claim, however, does not alter the appealability analysis. As the Court recently noted in *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 6, proof of actual prejudice is essential to a claim that pre-indictment delay has resulted in a deprivation of due process. Hence, motions to dismiss because of pre-indictment delay, like those based on the denial of a speedy trial, cannot intelligently be assessed prior to trial, and the district court's pretrial rejection of such claims does not meet *Cohen*'s "threshold requirement" of a fully consummated decision on a matter wholly independent of the merits of the case. See, *e.g.*, *United States* v. *Marion*, 404 U.S. 307, 326 ("Events of the trial may demonstrate actual prejudice but at the present time appellees' due process claims are speculative and premature"). Similarly, claims of pre-indictment delay would not be "lost, probably irreparably," if they had to await their resolution until after completion of the trial.

States, *supra*, 369 U.S. at 126. The Speedy Trial Clause fosters the compelling societal interest in the swift punishment of the guilty and the prompt exoneration of the innocent, an interest that would be severely compromised if every contested legal question arising in the course of a criminal proceeding could be resolved in a separate appeal before trial of the general issue. Evidence might be lost or memories might fade during the pendency of the appeal. Moreover, the period of pretrial incarceration for those defendants unable to post bail would be prolonged, and the anxiety suffered by defendants living under a cloud of unresolved public accusation would be intensified. See *Dickey* v. *Florida*, 398 U.S. 30, 37-38; *Klopfer* v. *North Carolina*, 386 U.S. 213, 221-226; *United States* v. *Ewell*, *supra*, 383 U.S. at 120.

Although some defendants might willingly risk these evils in the hope of securing a favorable result in the court of appeals, the Speedy Trial Clause "is generically different from any of the other rights enshrined in the Constitution" because it is as much designed to foster the interests of society in the expeditious disposition of pending criminal charges as to confer protection upon individual defendants. *Barker* v. *Wingo*, *supra*, 407 U.S. at 519-522. Indeed, the "societal interest in providing a speedy trial" exists not only separate from, but also "at times in opposition to, the interests of the accused." *Id.* at 519.

Delay may prejudice the prosecution's ability to prove its case (see *United States* v. *Avalos*, 541 F. 2d

1100, 1110 (C.A. 5)), it increases the cost to society of maintaining those defendants subject to pretrial detention, and it prolongs the period during which defendants released on bail may commit other crimes. See *Dickey* v. *Florida*, *supra*, 398 U.S. at 42 (Brennan, J., concurring). Excessive delay between accusation and conviction also undermines the efficacy of punishment as a deterrent to future crimes, threatens the chance for rehabilitation, and, in general, breeds widespread disrespect for the criminal justice system. *Barker* v. *Wingo*, *supra*, 407 U.S. at 519-521. In sum, delay—whatever its source—is inimical to the proper functioning of the criminal law; the Speedy Trial Clause guards both society and the accused against unjustified delays, and the final judgment rule is one of the principal mechanisms by which this speedy trial guarantee is enforced.

It would be ironic indeed if an exception to the strict rule against pretrial appeals in criminal cases were created for alleged violations of the right to a speedy trial. Experience suggests that most claims of unconstitutional pretrial delay will be correctly adjudicated in the district court. Some undoubtedly will not, but the price for ensuring the expeditious appellate vindication of a few erroneously rejected claims would be a lengthy delay in the overwhelming number of cases in which the defendants have appealed from proper denials of their Sixth Amendment motions. Some assertions of delay-caused prejudice between indictment and trial, validly rejected when first presented, would become self-fulfilling prophecies as

memories dim or important evidence is lost during the period necessary for review. And as this Court has noted (*Barker* v. *Wingo*, *supra*, 407 U.S. at 521), "[d]elay is not an uncommon defense tactic," since it not only postpones an eventual incarceration in many instances, but also frequently weakens the government's case—and it is the government that has the burden of proof. See *United States* v. *Ewell*, *supra*, 383 U.S. at 122-123.

There is, in addition, nothing so precise about the circumstances that will support an alleged abridgement of the speedy trial guarantee as inherently to limit the availability of the claim. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 521-522, 530. Unlike a motion to dismiss on double jeopardy grounds, which at least requires a plausible showing that the defendant has once before been in jeopardy of federal conviction on the same or a related offense, there will in every case be *some* period between arrest or indictment and trial, during which time "every defendant will either be incarcerated * * * or on bail subject to substantial restrictions on his liberty." *Id.* at 537 (White, J., concurring). "Possible prejudice is inherent in any delay, however short * * *." *United States* v. *Marion*, 404 U.S. 307, 322.

It would be the rare defendant, therefore, who could not proffer a colorable speedy trial claim and, if pretrial appellate review of an adverse decision were permitted, obtain the delay that is often an important aspect of defense strategy. The inevitable interruption of proceedings in the district court would, in a large

number of cases, needlessly prevent the prompt disposition of criminal charges guaranteed by the Speedy Trial Clause—a guarantee designed as much to benefit society as the accused. Nothing in the Sixth Amendment or 28 U.S.C. 1291 requires that anomalous result. The prudent course is to minimize pretrial delay by requiring a defendant whose speedy trial motion has been denied by the district court to proceed to trial, not to encourage further delay by countenancing protracted interlocutory appeals.[22]

II. THE INTERVAL BETWEEN RESPONDENT'S ARREST BY THE MILITARY AND HIS SCHEDULED TRIAL DATE ON THE FEDERAL CHARGES DID NOT VIOLATE THE SIXTH AMENDMENT OR WARRANT DISMISSAL OF THE INDICTMENT

If the Court agrees with our submission that appellate resolution of respondent's speedy trial arguments must await review of the entire case, in the event that

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[22] Respondent's case graphically illustrates the point. Although the district court denied respondent's motion to dismiss in July 1975 and his trial was scheduled to begin on August 18, 1975, the court of appeals did not decide the speedy trial claim until January 1976 and did not deny a petition for rehearing until April of that year. The claim has yet to be finally resolved, some two years after respondent's trial would have ended but for the delay occasioned by the interlocutory appeal.

It is also safe to assume that the court below expedited its consideration of respondent's appeal because of what it viewed to be the "extraordinary nature" of this case (Pet. App. 5a). Presumably that treatment could not be accorded the large number of mundane speedy trial appeals that would surely follow from a holding that the courts of appeals have jurisdiction to entertain such claims.

respondent is convicted, the judgment of the court of appeals should be vacated and the case remanded. If, however, the Court concludes that the court of appeals had jurisdiction to entertain respondent's Sixth Amendment claim, it must then consider whether the court below properly determined that the pretrial delay in this case warranted dismissal of the indictment. We submit that the ruling of the court of appeals on that issue represents a serious misapplication of the Speedy Trial Clause of the Sixth Amendment.

As the court of appeals acknowledged (Pet. App. 12a), no significant delay, and certainly no delay approaching constitutional magnitude, occurred in this case between respondent's indictment in January 1975 and the date trial was scheduled to begin, in August 1975. The court's holding that respondent was deprived of a speedy trial therefore plainly rests on the premise that respondent's Sixth Amendment right attached in the spring of 1970, when he was arrested and his commanding officer preferred criminal charges against him pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 13a-17a), and that this right continued unabated until August 1975, even though the military charges were completely dismissed and respondent was released from all restraints on his liberty in October 1970 (*id.* at 17a-20a).

Hence, the court of appeals reached the incongruous—and unsupportable—conclusion that, in the four-year period between dismissal of the military proceedings and his federal indictment, respondent was

entitled to insist upon a prompt resolution of the charges against him, despite the fact that no such charges were pending during any part of that period. This result finds support in neither the language nor the policies underlying the Speedy Trial Clause.

Properly viewed, respondent's complaint is one of pre-indictment delay under the Due Process Clause of the Fifth Amendment. As Judge Craven observed in dissent, however, and as we elaborate below (see pp. 63-70, *infra*), dismissal of respondent's indictment also cannot be justified on this ground. The delay was in large part attributable to an intensive and painstaking investigation rather than to an attempt to gain a tactical advantage over the accused, and it did not result in any demonstrable prejudice to respondent's defense.

A. The Speedy Trial Clause Is Inapplicable To The Period When A Defendant Is Not Under Arrest Or Other Formal Public Accusation Of A Crime

1. *The Sixth Amendment speedy trial guarantee is designed to ensure the expeditious resolution of pending criminal charges*

a. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." "On its face," as the Court noted in *United States* v. *Marion*, *supra*, 404 U.S. at 313, "the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." The

history of the Speedy Trial Clause, which has been explored by this Court in the past and needs no extensive rehearsal here, confirms what its clear language suggests—that the constitutional guarantee of a speedy trial applies only when a criminal prosecution against an accused is underway. See *United States* v. *Marion*, *supra*, 404 U.S. at 313-320; *Klopfer* v. *North Carolina*, *supra*, 386 U.S. at 223-226. It is "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, *supra*, 404 U.S. at 320. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5; *Dillingham* v. *United States*, 423 U.S. 64.

The rationale for this consistent interpretation of the Speedy Trial Clause is not difficult to apprehend. After a person has been formally accused of a crime, he has a substantial interest in an expeditious disposition of the charges. Inordinate delay between accusation and trial may prejudice the defense, since exculpatory evidence may be lost, helpful witnesses may die, or memories may fade. But the defendant's concerns generally extend far beyond such speculative considerations to more concrete and immediate manifestations of harm. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family

and his friends." *United States* v. *Marion*, *supra*, 404 U.S. at 320. Once the government has set the criminal process in motion, with these inevitable consequences, it assumes a duty, imposed by the Sixth Amendment, to bring the accused to trial with a minimum of delay.

These considerations obviously have little application to a period during which no formal criminal charges exist. Until arrest or indictment occurs, "a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, *supra*, 404 U.S. at 321. And it of course makes no sense to require the government to dispose swiftly of criminal charges against an individual when no such charges are outstanding.

The constitutional guarantee of a speedy trial, therefore, is not engaged until formal accusation of a crime. It is the logical corollary of this conclusion that a defendant's Sixth Amendment rights also do not continue after a criminal proceeding has been terminated. Here, for example, once the military authorities determined in the fall of 1970 that there was insufficient evidence to warrant reference of the charges against respondent to court-martial, any interest protected by the Speedy Trial Clause that he had in securing a prompt trial on those charges was extinguished.[23] Respondent no longer stood officially

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[23] Before any charge may be referred to court-martial, it must be subjected to a thorough and impartial investigation

and publicly accused of any crime, nor was his liberty in any way restricted.[24] Moreover, whatever stigma attached to the public, official accusation presumably was eliminated by the equally public, and equally official, dismissal. Until the grand jury determined four years later, after its reinvestigation of the case, that there was probable cause to believe that respondent had committed the murders of his wife and children, there was no formal accusation of wrongdoing upon which respondent could have been tried. In these circumstances, to hold, as did

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conducted in accordance with Article 32 of the U.C.M.J., 10 U.S.C. 832. See note 7, *supra; Manual for Courts-Martial, United States* ¶ 34 (Rev. ed. 1969). The Article 32 investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges"; although "[i]t is judicial in nature," it is only "a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels*, 27 C.M.R. 280, 286. Accord, *United States* v. *Cunningham*, 30 C.M.R. 402, 404. See also *Humphrey* v. *Smith*, 336 U.S. 695 (discussing the proceeding mandated by the 70th Article of War, 10 U.S.C. (1940 ed.) 1542, supplanted in 1950 by Article 32). Its functional counterparts in federal criminal procedure are the grand jury proceeding (see *MacDonald* v. *Hodson*, 42 C.M.R. 184) and the preliminary examination (Rule 5.1, Fed. R. Crim. P.). As noted in our petition (Pet. 18-19, n. 13), we have assumed for the purposes of this case that respondent was arrested in May 1970 and that his Sixth Amendment rights attached at that point, although Judge Craven's dissent casts considerable doubt on this conclusion (Pet. App. 34a-35a, 38a-40a).

[24] After dismissal of the charges, respondent was immediately permitted to resume his duties as a physician with the rank of captain until his honorable discharge for reasons of hardship in December 1970. Thereafter, respondent continued to practice medicine as a private citizen.

the court of appeals, that respondent's right to a speedy trial nevertheless continued to run between October 1970 and January 1975 is "to wrench the Sixth Amendment from its proper context." *United States* v. *Marion*, *supra*, 404 U.S. at 322.

The other courts of appeals that have confronted this issue have had little trouble in concluding that the Speedy Trial Clause does not extend to the period after charges against a defendant have been dismissed but before the same or related charges are reinstituted. In *United States* v. *Bishton*, 463 F. 2d 877 (C.A.D.C.), for example, the defendant was reindicted after the initial charge against him had been thrown out on jurisdictional grounds. The District of Columbia Circuit, relying on *Marion*, expressly declined to consider the interval between the dismissal of the first indictment and the return of the second in assessing the defendant's speedy trial claim, because "during this time [defendant] was a free man against whom no prosecution was pending." *Id.* at 891.

Similarly, in *United States* v. *Martin*, 543 F. 2d 577 (C.A. 6), certiorari denied, 429 U.S. 1050, the defendant had been charged with an offense in August 1972, but the charges were dismissed five months later. Defendant was reindicted in December 1974 for the same criminal activity, and he was tried and convicted in December 1975. Refusing to consider the interim between indictments in passing upon the defendant's contention that his right to a speedy trial had been violated, the Sixth Circuit observed: "The

Sixth Amendment right to a speedy trial does not attach until the formal charge, the trial of which is alleged to have been inordinately and prejudicially delayed, is made. * * * Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time." *Id.* at 579 (citation omitted). The Tenth and Second Circuits also have expressed these views in rejecting speedy trial claims in situations analogous to this case. *United States* v. *Stoker*, 522 F. 2d 576, 579-581 (C.A. 10); *United States* v. *Flores*, 501 F. 2d 1356, 1359-1360 (C.A.2).[25]

b. Although the court of appeals recognized that the dismissal of the military charges in October 1970 freed respondent from formal public accusation and its attendant unfavorable consequences, it nevertheless held that respondent's speedy trial rights con-

[25] *Flores* involved an application of the district court's prompt disposition rules, rather than a direct holding on a constitutional speedy trial claim. However, the purpose of those rules is to implement the Sixth Amendment's speedy trial requirement (cf. *United States* v. *Marion, supra,* 404 U.S. at 318-319 and n. 10) and the court's analysis is fully applicable to an interpretation of the constitutional provision: "During this period [after charges had been dismissed, defendant] was not subject to any of the disabilities associated with being under arrest, the subject of a complaint or indictment, or in the midst of a criminal prosecution. He was under no more jeopardy than any other citizen, and the fact that he might have been under investigation has no more effect after the dismissal on the running of the * * * period [during which a trial must begin] than it would have had before his arrest, that is, none." 501 F.2d at 1359-1360.

tinued "during the interval between the termination of the Article 32 proceedings and his arrest after indictment" in January 1975 (Pet. App. 17a). This was so, the court said, because respondent "realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution" (*ibid.*; footnote omitted).

Respondent's position prior to his indictment, however, even assuming the accuracy of the court of appeals' description, was no different from that of any individual who, although not yet arrested or otherwise formally charged with a crime, is aware that he is the focus of an ongoing criminal investigation. The targets of such inquiries inevitably suffer anxiety at the prospect of prosecution at some future date and are often obliged to hire an attorney to defend their interests. Anxiety and public obloquy, or the incurrence of expenses attributable to legal difficulties, obviously do not depend upon formal accusation; an official investigation of wrongdoing that has not yet culminated in criminal charges may have a quite similar effect, especially if its progress is publicized.[26] But the "particular protections" (*United*

[26] Even for publicized targets of criminal investigations, however, the impact on job, family, friends, and personal finances is far less severe prior to formal accusation than after. Rumors that may surface concerning the identity of

States v. *Marion*, *supra*, 404 U.S. at 320) of the Speedy Trial Clause are not engaged by such circumstances. Cf. *Kirby* v. *Illinois*, 406 U.S. 682, 689-691; *Hoffa* v. *United States*, 385 U.S. 293, 309-310.

This much is settled by the Court's decision in *United States* v. *Marion*, *supra*, which involved an indictment in 1970 for fraudulent business practices that allegedly occurred from 1965 to 1967. The government's investigation of the fraudulent scheme, with its focus on the defendants, had been the subject of widespread publicity well before the criminal charges were formally brought: more than three years in advance of the indictment, a series of newspaper articles had identified the defendants in connection with the investigation and had revealed that a prosecution would soon be initiated, and two years prior to the indictment the defendants had been asked by the United States Attorney's Office to submit business records pertinent to the investigation.

The defendants moved to dismiss the charges, contending that the substantial delay between the alleged commission of the crime and the return of the indictment violated their Sixth Amendment right to a speedy trial. This Court disagreed. Although the Court did not deny that a putative defendant may

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potential defendants seldom will be as damaging to those persons as their arrest or indictment, which, because of its official status, will serve almost inevitably in the minds of some to transform any preexisting speculation into apparently justified suspicion. Anxiety in the usual case also is increased immeasurably by formal accusation—with its assurance of a criminal trial and the heightened prospect of conviction and punishment.

suffer harmful emotional and financial consequences by virtue of his status, it concluded that the protections of the Speedy Trial Clause do not come into play until those consequences relate to a formal criminal charge. "Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. No principled distinction can be drawn between respondent's position after the military had dismissed the charge against him for lack of evidence and that of the defendants in *Marion;* in neither case was there outstanding during the period of delay an official accusation on which a speedy trial could have been held.

Nor does *Klopfer* v. *North Carolina*, *supra*, on which the court of appeals relied (Pet. App. 18a-19a), suggest a different result. *Klopfer* presented the question whether authorities "may indefinitely postpone prosecution *on an indictment* without stated justification over the objection of *an accused* * * *." 386 U.S. at 214 (emphasis added). The unusual state procedure under scrutiny in that case permitted a prosecutor to enter a "*nolle prosequi* with leave" on any indictment that he did not wish to pursue immediately. Since the indictment was not discharged by the filing of the *nolle prosequi*, the statute of limitations remained tolled; hence, although the accused was released from custody, he remained vulnerable to prosecution on the same indictment at any time, at the option of the prosecutor.

This Court held that the North Carolina procedure violated the right to a speedy trial, because the suspension of the prosecution "indefinitely prolong[ed the] oppression, as well as the 'anxiety and concern accompanying *public accusation*'" (386 U.S. at 222, quoting from *United States* v. *Ewell*, *supra*, 383 U.S. at 120, emphasis added). Thus, as Judge Craven observed in dissent in this case (Pet. App. 37a), the distinction that the panel majority acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here [respondent] was not indicted until the end of the period" (*id.* at 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Speedy Trial Clause. Nothing in *Klopfer* supports an extension of the speedy trial protection to the period when a defendant is not the subject of *any* criminal charges.[27]

[27] The court of appeals' erroneous inclusion of the period between October 1970 and January 1975 in its speedy trial calculations eliminates the need to challenge its analysis of the factors identified in *Barker* v. *Wingo*, *supra*, 407 U.S. at 530, since respondent has never contended that his Sixth Amendment right to a speedy trial was violated by the post-indictment delay standing alone (Pet. App. 12a). Assuming that the four years during which no charges were pending against respondent could properly be considered for Sixth Amendment purposes, however, we believe that the court of appeals erred in concluding that respondent was denied a speedy trial.

Although the length of the delay in this case was substantial, *Barker* (which involved a gap of more than five years between arrest and trial) indicates that that factor is insufficient by itself to establish a Sixth Amendment violation. Moreover, as we discuss below (see pp. 64-70, *infra*), respondent has failed to demonstrate either that the delay was wholly unjustified or that it resulted in prejudice to his defense. While respondent may have experienced anxiety in the aftermath of the crimes, such general allegations are entitled to little weight. See *United States* v. *Jackson*, *supra*, 542 F.2d at 409; *United States* v. *Graham*, *supra*, 538 F.2d at 265; *United States* v. *Saglimbene*, 471 F.2d 16, 18 (C.A. 2), certiorari denied, 411 U.S. 966. Anxiety is suffered by all defendants, and respondent's complaint appears less compelling than most: he did not stand publicly accused of wrongdoing during more than a few months of the period of delay, he was not incarcerated, and there was no significant disruption of his activities.

Finally, there is no basis for the court of appeals' statement that respondent "reasonably asserted his right to a speedy trial" (Pet. App. 24a). Indeed, the court's conclusion demonstrates the incongruity of a Sixth Amendment analysis in circumstances such as these. Respondent could not have asserted a right to be tried between October 1970 and January 1975, since no charges were then pending against him. Nor can the correspondence from respondent's counsel to the Department of Justice during 1973 and 1974 (A. 89-109) even be fairly characterized as a demand that respondent be indicted. These letters consisted either of neutral inquiries concerning the current status of the government's investigation or requests that the government halt its efforts to link respondent to the murders on the ground that the Article 32 inquiry had established his innocence.

2. *Extension of the Speedy Trial Clause to the period after charges against an accused have been dismissed would have a substantial adverse impact on administration of the criminal law*

It is not uncommon for criminal charges to be dismissed as a matter of prosecutorial discretion. Arrests may be made improperly or indictments obtained

prematurely; even when an arrest or indictment is proper, the government may decide not to pursue the case because subsequent and considered judgment reveals that the evidence (though satisfying the probable cause requirement) may not be sufficient to establish guilt beyond a reasonable doubt. And on other occasions, non-evidentiary factors, legitimately a part of the decision whether to prosecute, may indicate that a criminal proceeding would not be in the public interest. Cf. *United States* v. *Lovasco*, *supra*, slip op. 11. In such circumstances the accused is spared the financial and emotional burdens of a trial, with the risk of conviction, and the courts, the prisons, and the public are saved the expense associated with an unnecessary or unwise utilization of the criminal justice system.

The cost to society from such exercises of prosecutorial discretion has generally been thought minimal, since (assuming the statute of limitations has not expired) the government may always reassess a decision not to prosecute in light of additional evidence or other events. But the incentive to follow this sound course is significantly diminished if, by declining to pursue a case at the outset, the prosecutor would thereby risk forfeiting the government's right to try the accused at any time.

The consequence of a holding that a defendant's speedy trial rights, once triggered by arrest or indictment, continue to run despite a dismissal of the charges may therefore be the prosecution of individuals who would otherwise not be tried at all. Moreover, trials undoubtedly would result in some instances in acquittal of the guilty because of the government's inability in the short time available after an arrest to develop compelling proof of guilt. See *United States* v. *Lovasco*, *supra*, slip op. 9. Even if the prosecutor did decide to dismiss charges following an arrest in the hope that additional evidence could be developed, further investigation of the case would occur in a hurried atmosphere hardly conducive either to the accumulation of reliable evidence or to scrupulous adherence to constitutional standards.

For these reasons, the decision below represents poor policy as well as bad law. Congress has recognized as much in the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, which was enacted "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses * * *." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). Section 3161(d) of the Act permits the strict time limits imposed elsewhere in the statute to run anew if an indictment or information is dismissed on the defendant's motion, or if a complaint "is dismissed or otherwise dropped" prior to indictment, and the defendant is subsequently charged with the same offense.[28] Furthermore, for purposes of com-

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[28] Sections 3161(b) and (c) generally require indictment to occur within 30 days of arrest, arraignment to occur within 10 days of indictment, and trial to occur within 60 days of arraignment.

puting the time within which a trial must be held under the Act, Section 3161(h)(6) excludes any period of delay between the dismissal of an indictment or information on the motion of the government and the filing of a new charge against the accused for the same offense."

These rules intelligently advance the interests protected by the Speedy Trial Clause and, in our view, reflect the proper interpretation of the constitutional provision. When a charge dismissed at the behest of the prosecutor is later reinstituted, the time that has elapsed between the filing of the initial charge and its dismissal should be included in considering the defendant's right to a speedy trial on the second indictment. Thus, a prosecutor would be prevented from testing the limits of permissible pretrial delay, dropping the charges, and then starting with a clear slate by the simple expedient of recharging the same offenses. See S. Rep. No. 93-1021, *supra*, at 38. However, where, as here, the dismissal is not engineered by the prosecution, the permissible time for trial on the second indictment is measured from the date that the renewed charge is brought. And in no event is the period during which no charge is pending against the accused included in the speedy trial calculation.

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[29] These provisions generally embody recommendations of the American Bar Association. See American Bar Association, *Standards Relating to Speedy Trial* §§ 2.2(b), 2.3(f) (Approved Draft 1968).

B. The Pre-Indictment Delay In This Case Did Not Violate The Due Process Clause

The conclusion that respondent's rights under the Speedy Trial Clause of the Sixth Amendment have not been infringed does not indicate that the five-year period between the murders of respondent's family and his indictment for those offenses is beyond judicial scrutiny. As this Court observed in *United States* v. *Marion*, *supra*, 404 U.S. at 324, and *United States* v. *Lovasco*, *supra*, slip op. 6, and as Judge Craven noted in dissent below (Pet. App. 40a-41a), the proper inquiry in cases of pre-indictment delay is one of due process under the Fifth Amendment.

A lengthy delay prior to accusation violates the Due Process Clause if it causes actual prejudice to the defense and if the government's justification for the delay is inadequate. *United States* v. *Lovasco*, *supra*, slip op. 6-13. Although the court of appeals did not undertake this analysis, and although we continue to believe that the question of prejudice to the defense is best resolved after the trial has taken place,[30] only a brief recitation of the relevant facts is required to demonstrate that respondent could not sustain his burden of proving a due process violation in this case.

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[30] See Brief for the United States, *United States* v. *Lovasco*, *supra*, at 40-48, a copy of which is being sent to respondent.

1. *Respondent has not demonstrated actual prejudice to his defense because of the delay in accusation*

Proof of actual prejudice to the defense from a pre-indictment delay is an essential element of a due process claim. *United States* v. *Lovasco*, *supra*, slip op. 6-7. While a substantial period of time admittedly elapsed between the murders in February 1970 and respondent's indictment, this is not a case in which any prejudice from the delay is likely to have occurred. The government's case from the outset has consisted almost exclusively of physical evidence culled from the crime scene, the testimony of scientific experts interpreting that evidence, and the logical inferences to be drawn therefrom. The reliability of such evidence does not diminish with the passage of time, nor does the ability of defense experts to offer contrary interpretations of its significance.

Moreover, respondent is the only witness with first-hand knowledge of the crimes and his defense has therefore always hinged principally upon the credibility of his story rather than the testimony of others. Respondent has never claimed an inability to recall the events of the night in question; indeed, he has presented essentially the same version of those events from his initial interview on the morning following the murders to his appearances before the grand jury in 1974 and 1975. There are no missing or dead witnesses, and respondent has never claimed otherwise. Virtually every person with knowledge of the pertinent events was questioned at length dur-

ing the exhaustive pre-indictment investigations, and many of the important witnesses testified at the Article 32 hearing. All prior statements in the case have been transcribed and preserved.

The court of appeals' response to these arguments illustrates the speculativeness and illogic of its determination that respondent was seriously prejudiced by the pre-indictment delay. The prime example of prejudice suggested by the court was that, in the five years since the crimes took place, memories may have faded and "witnesses can no longer be expected to reliably recall details" (Pet. App. 25a)—a conclusion difficult to reach in any case in the absence of a trial, but also one without any factual support in this record. In addition, the court was concerned that "a detailed reconstruction of the murder scene" might not be possible at this late date (*id.* at 26a) and that, because most of the witnesses who were in the Army in 1970 have now been scattered around the country, "interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive" to respondent (*id.* at 25a). Whatever the validity of these latter assertions of prejudice,[31] neither is fairly attributable to an undue delay by the government, since each allegation would have

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[31] We question the significance of either factor. Hundreds of photographs of respondent's apartment were taken on the day of the crime, and the murder scene has remained intact to this day (see note 9, *supra*). Furthermore, the government has offered to provide respondent with the current addresses of all witnesses interviewed during the investigation (see Pet. App. 25a).

been equally true in June 1972, when the massive C.I.D. investigation was completed and when, according to the court of appeals, respondent could have been tried without violating his constitutional rights (*id.* at 21a).

It is of course impossible to discount entirely the possibility that respondent may have been materially prejudiced by the delay prior to his indictment, although we think that possibility is quite remote in view of the considerations outlined above. Events at trial may substantiate the court of appeals' fears. What *is* clear at this stage, however, is that the conclusory observations of the court below fall far short of establishing the "actual prejudice" required to warrant a dismissal of an indictment under the Due Process Clause.

2. The pre-indictment delay in this case was not the result of improper government conduct

Even if respondent were able to demonstrate concrete prejudice to his defense from the pre-indictment delay, that showing alone would not entitle him to relief. This Court held in *United States* v. *Lovasco*, *supra*, slip op. 6-7, that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." The Court explained the standards that govern an assessment of the reasons offered for pre-indictment delay (*id.* at 7):

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin* v. *California*, 342 U.S. 165, 170 (1952). Our task is more circumscribed. We are to determine only whether the actions complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, at 173.

Measured against these principles, the delay in this case did not warrant dismissal of the indictment.

The overwhelming portion of the five years prior to respondent's indictment was spent in diligent efforts to solve a complex and bizarre crime. The period between February 1970, when the murders were committed, and October 1970, when the military charges against respondent were dropped, was consumed by the Army's initial exhaustive investigation and by the Article 32 inquiry that led to the dismissal. During the next 18 months, until June 1972, the C.I.D. engaged in a wholesale reinvestigation of the case, a course of action that the court of appeals conceded to be entirely understandable in light of the dismissal

of the charges against respondent for insufficient evidence (Pet. App. 21a). Indeed, a substantial part of this renewed inquiry was spent in attempting to locate the intruders that respondent alleged had committed the crimes as well as to document or dispel respondent's repeated allegations that the evidence gathered from his apartment was unreliable because of the misfeasance of the police who had first arrived on the scene (see, *e.g.*, A. 76).

Not until June 1972 was the C.I.D.'s 13-volume report submitted to the Department of Justice. Several more months were then required for Department of Justice personnel to digest the contents of the report and to suggest other potentially fruitful lines of inquiry. In response to requests by the Department, the C.I.D. forwarded supplemental reports on November 9, 1972, and August 30, 1973 (A. 87). After these additional reports were received, no significant progress in the investigation was made until May 1974, when it was determined to utilize the services of the F.B.I. and the grand jury in a final effort to sift through the evidence and to reach conclusions about the case. Once the grand jury was empaneled in August 1974, the investigation again proceeded with dispatch, culminating in respondent's indictment in January 1975.

Thus, the only period during which the five-year investigation essentially stagnated was the nine months between the Department's receipt of the final supplemental C.I.D. report and the decision to institute a grand jury investigation of the crime. The

court of appeals acknowledged that this delay was not designed to hamper respondent's defense (Pet. App. 20a), instead attributing it to "indifference, negligence, or ineptitude" (*id.* at 23a). Regardless of whether this latter characterization of the government's efforts is accurate, we believe that, for reasons we have discussed elsewhere,[22] the absence of a finding that the delay was undertaken in bad faith or to gain a tactical advantage over the accused is fatal to any claim that respondent was deprived of due process. The failure of the prosecution to have proceeded with the celerity deemed desirable in retrospect by the court of appeals does not offend "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.'" *United States* v. *Lovasco*, *supra*, slip op. 7 (citations omitted). After all, much of the delay in this case was concededly spent in exploring and re-exploring every avenue of inquiry, both favorable as well as unfavorable to respondent, so that an accusation concerning a particularly heinous crime would not be made unjustly. Delay in indictment motivated largely by those concerns is not in any sense unfair.

In sum, respondent has been charged by the grand jury with three serious crimes. To preclude prosecution of a defendant whose guilt may be capable of

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[22] See Brief for the United States, *United States* v. *Lovasco*, *supra*, at 13-16, 22-23, 32.

establishment beyond a reasonable doubt is a grave step. It should not be taken on the basis of judicial second-guessing of the quality of the investigation conducted by the executive branch or of speculative assessments of the possible prejudice to the accused. It can be justified only upon a showing that the delay in reaching a prosecutorial decision was fundamentally unfair and violated the defendant's right to due process of law. This Court has stated that "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell, supra,* 383 U.S. at 122. See also *United States* v. *Lovasco, supra,* slip op. 5-6. The determination of Congress that an indictment for first-degree murder may be brought at any time (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of that offense is so substantial that prosecution is not to be foreclosed regardless of the passage of time. In this case there is no constitutional impediment to that legislative judgment.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss respondent's appeal for want of jurisdiction. If the Court reaches the merits, it should reverse the judgment of the court of appeals.

Respectfully submitted.

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OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,
Petitioner,

v.

JEFFREY R. MACDONALD,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Brief for Respondent Jeffrey R. MacDonald

COUNTER-STATEMENT

A. The crime and pre-accusation investigation.

In February 1970, Jeffrey R. MacDonald was a medical doctor on a two-year term of military duty with the Army Sixth Special Forces Group at Fort Bragg, North Carolina. He lived with his wife Colette and his two daughters, Kimberly, 6, and Kristen, 3, in a home on the Army base.

In the early morning hours of February 17, 1970, Mrs. MacDonald and the two children were murdered, and Dr. MacDonald suffered a variety of injuries including a near-fatal

stab wound in his right lung. According to the Army's Article 32 investigation the murders and assault were committed by a group of intruders armed with several knives, an ice pick and wooden clubs.[1]

When military police and medical personnel arrived at the house, Dr. MacDonald was found unconscious, but later was able to supply information concerning the attackers, including a woman member of the group. The description of her matched that of a woman seen on a deserted, rain-soaked street corner at 4.00 a.m. near the MacDonald home by a military policeman who was responding to Dr. MacDonald's telephone call for help. The military police inexplicably failed to set up roadblocks at the exits of Fort Bragg until three hours after the crimes had been discovered, and the woman was not apprehended.[2]

Despite information supplied by Dr. MacDonald, the military police and other evidence, an investigator from the Army's Criminal Investigation Division (CID) concluded shortly after the crimes that Dr. MacDonald was the principal suspect in the murders of his family.[3] The investigator's opinion was based on the belief that the crime scene had been "staged," and because he, personally, was unable to find any physical evidence that there had been intruders in the MacDonald home.

Sworn testimony by various military policemen, who had arrived at the MacDonald house before the CID, established that there was a total failure to protect the crime scene from disturbance. For example, a man in civilian clothing was allowed to walk through the scene and sit on the sofa where Dr. MacDonald

1. The government relies extensively on the Article 32 record but does not report the conclusions of the presiding officer, Colonel Rock.

2. Article 32 testimony of J. L. Paulk and W. A. Boulware, E-42; E-3, at 15-109, 1612-1624. The page numbers are those of the verbatim Article 32 transcript. The references to "E" are to Exhibit numbers to Colonel Rock's report. *See* Government brief, at 4 n. 1.

3. Ivory Grand Jury testimony, at 110.

had been stabbed and wounded. The unidentified person apparently picked up the flower pot that had been lying on its side, and stood it upright.[4] CID investigators later concluded that the fact that the flower pot was *not* lying on its side was evidence that the crime scene had been staged.[5]

More than a dozen MP's and army hospital personnel tramped through all parts of the house. A wheeled stretcher was rolled through the entire length of the crime scene. Yet the CID investigator who concluded that there was no evidence of intruders in the house also found no signs of the disorganized presence of the Army personnel who had been on the scene before he arrived.

The shocking nature of the crimes and the immediate wave of notoriety caused the Army to assign the investigation the highest priority. A team of CID agents and military police investigators was detailed to work full time on the case. A group of technicians was flown in from the CID crime laboratory at Fort Gordon, Georgia. The technicians and CID agents processed the crime scene for five continuous days. Entire sections of walls and floors of the MacDonald home were dismantled and taken to the CID laboratory.[6] The house was sealed by the Army and to this day remains closed as part of the evidence in this case.

However, the investigation by the CID was also characterized by the irretrievable destruction of evidence. A group of forty-four fingerprints was located at a place in the house critical to the investigation. The fingerprints were dusted, photographed and then "lifted." However, in the lifting process, the prints were

4. Article 32 testimony of K. C. Mica, E-34, at 150-153.

5. The CID did not bother to ask the Military Police who were the first at the house whether the crime scene had been disturbed. And, the CID did not learn until the testimonial phase of the Article 32 proceedings that the flower pot had been moved *after* the MP's arrived at the house. Article 32 testimony of K. C. Mica, E-34, at 150-153.

6. The systematic and extensive laboratory work that was done is described in detail in the Government's brief before the Court of Appeals for the Fourth Circuit, at 43-44.

destroyed. And, the photographs of the fingerprints had been improperly taken and were unidentifiable.[7]

Although the CID was joined in the investigation by the Federal Bureau of Investigation, the Army was ultimately given the responsibility of carrying out the investigation of the crimes.

The CID laboratory conducted tests of several hundred items of physical evidence during a month and a half period. When the final reports of the laboratory were submitted to the CID investigators, they viewed them as confirmation of their original suspicions about Dr. MacDonald.

With the laboratory findings on the physical evidence in hand, and with results of seven weeks of extensive investigation, the CID called in Dr. MacDonald for interrogation. He was given the military equivalent of *Miranda* warnings and told that he was the suspect in the murders of his family. Following that interrogation, he was ordered restricted to his quarters by his commanding officer.

B. The commencement of military justice proceedings.

Although the government had a choice of forums in which to prosecute Dr. MacDonald, either in the district court or before a military court, it elected to proceed with the criminal case against him under the military justice system.

On May 1, 1970, Dr. MacDonald was formally charged and arrested for the murders of his family.[8]

---

7. Ivory Grand Jury testimony, at 97-99. Article 32 testimony of H. O. Medlin, E-33, at 497.

8. Because he was an officer, rather than being placed in a stockade, he was confined to his quarters under 24-hour armed guard. Access to him could only be had by persons approved by his commanding officer. He was only able to leave confinement for exercise, meals and for legal matters, and at all those times he was in the custody of another officer.

The government concedes that under the circumstances of this case, this was confinement for purposes of analysis of the Sixth Amendment right to a speedy trial. Pet., at 18.

Immediately thereafter the military justice process was officially begun against Dr. MacDonald by the forwarding of charges.[9] The charges were publicly announced—in this case by a press release from the Army and a press conference by the Provost Marshall of Fort Bragg.

On May 12, 1970 an order was issued directing the commencement of full Article 32 proceedings against Dr. MacDonald. (A. 131) These began promptly on May 15, 1970. (A. 132) The presiding officer was Colonel Warren V. Rock, an infantry officer with thirty years of service and substantial courts-martial experience. He had the full-time assistance of a qualified military judge, Captain Hammond A. Beale, Jr., as his legal adviser.

The government was represented by two prosecutors who were fully qualified under military regulations. Dr. MacDonald was present throughout the proceedings and was represented by counsel.

Proceedings under Article 32 are significant, the government's contention to the contrary notwithstanding. It bears little resemblance to the preliminary hearing in federal civilian courts. The determination in the latter is whether there is a prima facie case against the accused. In an Article 32 proceeding, the determination to be made is "the truth of the matter set forth in the charges . . ." 10 U.S.C. § 832.[10]

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9. To the extent that analogies may be drawn between the military and civilian systems of justice, the forwarding of charges is the equivalent of the return of an indictment. This action is taken only after a preliminary investigation has been completed. Manual for Courts-Martial ¶ 32b (U.S. rev.ed. 1969). At this point the statute of limitations ceases to run. Manual for Courts-Martial ¶ 33b (U.S. rev.ed. 1969); Articles 43(b), (c) of the Uniform Code of Military Justice, 10 U.S.C. §§ 843(b), (c). It is significant that the general federal statute of limitations, 18 U.S.C. § 3282, ceases to run at the time "the indictment is found or the information is instituted." Thus, the filing of sworn charges within the military system is by virtue of the Manual of Courts-Martial and the Uniform Code of Military Justice exactly analogous to the return of an indictment under 18 U.S.C. § 3282.

10. For a full discussion of the role of the Article 32 hearing in the military justice system, see MacDonald brief, 4th Cir., at 20-29.

The Article 32 proceedings were convened on May 15, 1970. At that time, the presiding officer asked counsel for the government when he would be ready to proceed with the presentation of evidence. The prosecutor stated he would be ready in two weeks. (A. 117) The matter was then recessed.[11]

At the outset of the testimonial phase of the proceedings on July 6, 1970, Colonel Rock stated that because of the extraordinary seriousness of the case and the attention it had received, the government would be required to present all the relevant evidence known to it supporting the charges against Dr. MacDonald.[12] The prosecutors acknowledged the directive of Colonel Rock and announced that they were ready and able to proceed.[13]

Under military regulations, Colonel Rock had the right to obtain and examine, in advance of the testimonial phase, the complete investigation files prepared by the CID. However, he declined to do so in favor of requiring the prosecution attorneys to present all of the evidence in open court. This decision may have been partially motivated by the fact that the prosecutors had refused to comply with the bulk of the defendant's demands for discovery. (A. 132)

The prosecutors knew that if they were to carry their burden of showing that the charges were "true," they could not rely upon or assume any knowledge by Colonel Rock of the facts obtained by the CID investigation. They knew that they had to put on a complete case at the Article 32 proceedings. There is no basis to believe the military prosecutors withheld evidence from Colonel Rock.

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11. A further continuance was granted until July 6, 1970, when the taking of testimony began.

12. Article 32 transcript, at 1.

13. *Id.*

C. The Article 32 proceedings and the evidence adduced therein.

The theory of the crimes, argued by the government at the Article 32 proceedings, was that Dr. MacDonald had become insanely incensed at his wife in an argument over whether their 3-year-old daughter should still be given a bottle at bedtime since she was bed wetting. (A. 141) The government argued that Mrs. MacDonald stabbed her husband, that he in turn lost ". . . all control in a blind fantastic mindless rage. . . .," clubbed her to death and then clubbed the youngest child to death. (*Id.*) Then, the government contended, Dr. MacDonald "regained his senses" and killed his other daughter as part of a scheme to falsely blame all the killings on intruders. (*Id.*)[14]

However, the government produced no evidence that Dr. MacDonald was anything other than a well-balanced and stable person. The evidence also showed that neither Dr. MacDonald nor his wife were under the influence of alcohol or drugs on the night of the murders. (A. 139)

Examination of the case as actually developed by the government showed that it was "wholly circumstantial and rested on a detailed, hypothetical reconstruction of the crime." (*United States v. MacDonald*, 531 F.2d 196, 199 (4th Cir. 1976); *see also* A. 141-145)

The government called twenty-seven witnesses. It placed in evidence the results of intensive CID laboratory examinations of

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14. The government's theory not only was unsupported by any evidence, it was even at odds with its own evidence. An example of this was the government's argument that it was Mrs. MacDonald who had stabbed Dr. MacDonald. However, the prosecution called three doctors in an effort to prove that the stab wound to his lung was self-inflicted by Dr. MacDonald. Two of the three government witnesses rejected the suggestion as not credible and described the injury as life-threatening. The third doctor called by the government testified that the injury was not life-threatening. However, it was developed that he had never examined Dr. MacDonald and that he had been grossly misled as to the location of the stab wound. E-15, at 1498-1507.

hundreds of items of physical evidence.[15] Some of the physical evidence was also examined by other experts retained by the government.[16]

The evidence presented by the prosecution at the Article 32 proceedings had been gathered over an eight month period and was the result of the efforts of more than one hundred military and civilian law enforcement investigators. These investigators had assembled material from approximately 1,500 witnesses, including a number who were in foreign countries. (MacDonald Appendix, 4th Cir., at A. 673)

At no time was there even a suggestion by the prosecutors or the CID investigators that the investigation was either incomplete or preliminary in any way.

Dr. MacDonald presented a full defense to the charges against him. He testified at length under oath and was subjected to an extensive cross-examination by counsel for the government. He was also questioned in detail by the presiding officer. His testimony was the same as the information he had given the military police, the CID investigators and the FBI.[17]

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15. Before this Court the government has attempted to explain the delays in this case by referring to the work of the CID laboratory as some sort of "preliminary laboratory analysis of the physical evidence." Government brief, at 7. There is nothing in the record, and nothing in fact, to support such a statement.

In neither the testimony of the various CID laboratory technicians at the Article 32 proceedings, nor in the dozens of pages of laboratory reports which were made part of that record, was there any suggestion that the work was other than comprehensive, complete and final. At no time did counsel for the government at the Article 32 proceedings ever indicate that the laboratory work was preliminary, or incomplete, or that the government needed further laboratory work in order to make out its proof.

16. All of this physical evidence was the same evidence examined by the FBI laboratory in 1974. No new physical evidence has ever been uncovered since the original investigation of this crime in 1970.

17. The government now concedes the consistency of Dr. MacDonald's statements. "[H]e has presented essentially the same version of those events from his initial interview on the morning following the murders

In addition to Dr. MacDonald, the defense called twenty-nine other witnesses.[18]

Among them was a well-qualified forensic psychiatrist. Because of the government's theory that Dr. MacDonald had slaughtered his family with a multiplicity of weapons in an insane rage over bed-wetting, this witness was asked to testify concerning the findings of his comprehensive psychiatric and psychological evaluations of Dr. MacDonald.

His conclusion was that if Dr. MacDonald had committed the murders in the particularly gruesome and vicious fashion that they took place, there would be some evidence of psychiatric problem, emotional disability or of a psychotic episode. He concluded that there was no evidence of such conditions. To the contrary, he found that Dr. MacDonald was a sane, well-balanced adult, with adequate and healthy outlets for his feelings. (A. 176-177) Finally, he concluded that Dr. MacDonald was not attempting to hide the facts concerning the murders. (A. 138)

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to his appearances before the grand jury in 1974 and 1975." Government brief, at 64. In oral argument in the court below, however, the government sought to justify its delay and to impute guilt to Dr. MacDonald by ascribing inconsistencies to him.

18. Some of these witnesses have been inaccurately described as character witnesses. Government brief, at 10. Because the government's theory was that MacDonald had destroyed his family in a rage over bed-wetting, a substantial number of witnesses who had known Dr. MacDonald, his wife and children at every stage of their lives were called to determine if there was any basis in fact for this theory. These witnesses testified to the relationship between the MacDonalds, and of Dr. MacDonald with his children. They covered every period of the MacDonalds' life from their days as high-school sweethearts, through undergraduate studies at Princeton, through medical school at Northwestern, through internship at Columbia Presbyterian Hospital in New York, and finally in the Army. These witnesses were rebuttal witnesses to the theory asserted vigorously by the prosecutors in their opening and closing addresses to the presiding officer. It is still the theory of the government's case today. Not one scintilla of evidence supported the suggestion that Dr. MacDonald was either emotionally unstable or given to violence of any sort toward his wife or children. A. 140, 181-183.

The defense also developed evidence that supported the conclusion that there had been intruders in the home. It was shown that there were a substantial number of fingerprints in crucial locations in the house that were not identified as belonging to the family. There was also testimony that several valuable items were missing from the house.

Most significantly, evidence introduced at the Article 32 proceedings showed that the activities of a woman, Helena Stokely, during the early morning hours when the murders occurred were highly suspicious and unusual. When wearing her blonde wig and floppy hat, she generally fit the description of the woman seen by Dr. MacDonald in his home during the murders. Miss Stokely did not deny her presence at the crime scene; she claimed she could not remember where she was because she was "stoned on mescaline." (A. 178-179) This testimony was so extraordinary that Colonel Rock specifically recommended that her involvement in the murders be investigated further. (A. 136)

D. The independent investigation made by the Article 32 presiding officer.

After the government and defense both presented extensive evidence at the Article 32 proceedings, the presiding officer utilized his own unique authority under the Uniform Code of Military Justice to make additional independent investigation of the facts and circumstances surrounding the murders.[19]

Among other things, he conducted his own investigation of the physical facts and made relevant experiments (A. 199-201); he obtained a psychiatric examination of Dr. MacDonald by doctors of his choice (A. 194); he called and examined his own witnesses (A. 193); and, he independently questioned the witnesses called by both parties.

19. In most ways, his powers are more analogous to those of the inquiring magistrate in Continental legal systems than to the committing magistrate of the American criminal justice system.

1. Psychiatric evaluation.

Of particular significance was the role of the presiding officer in obtaining his own psychiatric examination of Dr. MacDonald following the testimony of the defense psychiatrist. First, Colonel Rock obtained the defense psychological examinations. These were submitted to a team of three Army psychiatrists at Walter Reed Army Hospital, who were directed to examine Dr. MacDonald. He then ordered the prosecutors to fully brief the military psychiatrists on the facts of the crime and the investigation.

While the government did not have the authority to compel the defendant to submit to such an examination or disclose these materials, Colonel Rock made clear to the defense that he would substantially discount the defendant's own expert witnesses unless Dr. MacDonald fully cooperated with the psychiatric evaluation by Army doctors which he had arranged.

The Article 32 proceedings were adjourned to permit four days of examination of Dr. MacDonald in Washington, D.C., conducted under the direction of the chief of psychiatric services at Walter Reed. That doctor was then called as the presiding officer's witness when the proceedings were resumed.

In the words of Colonel Rock's final report, ". . . there is a striking similarity in the conclusions" of the defense psychiatrist and psychiatrists at Walter Reed Army Hospital. Those conclusions were that:

- Dr. MacDonald is a sane, well-balanced adult;
- that he was not hiding any of the facts concerning the night of the murders and the assault on himself;
- that he was sane on February 17, 1970 and sane at the time of the psychiatric examinations.

2. Presiding officer's own physical observations.

One key element of the government's case was the contention that the crime scene in the living room of the house had been staged. The CID investigators alleged that they had conducted

experiments with a coffee table and had concluded that if it had been knocked over during the course of a struggle, it would have landed upside down, rather than on its side as found on the morning of February 17, 1970. (A. 165)

During an adjournment in the testimonial phase of the Article 32 proceedings, Colonel Rock, accompanied by his legal adviser, conducted his own experiment with the coffee table in the MacDonald house. When struck by Colonel Rock, the table came to rest on its side, just as it had originally been found by CID investigators. (A. 200)

The presiding officer called a total of six witnesses of his own. He also questioned, independently of counsel, nearly every one of the fifty-seven witnesses who testified at the Article 32 proceedings.

E. The results of the Article 32 proceedings.

The Article 32 proceedings lasted five months. All the evidence the prosecutors had to support the accusations against Dr. MacDonald was produced. The hearings required more than four full weeks of in-court testimony.[20] The results were:

- a record of nearly 2,000 legal-sized pages;
- a 90-page summary of the evidence and conclusions;
- two findings.[21]

The first finding was that all charges against Dr. MacDonald "are not true." (A. 136)

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20. In accordance with military custom, the proceedings were convened at 8:30 a.m. and lasted until 4:00 or 4:30 p.m. daily, with a short recess for lunch. The average day involved six to six and one-half hours of testimony.

21. Since Colonel Rock's findings were subject to further review, the procedures followed by Colonel Rock in submitting detailed summaries of the evidence, his conclusions and findings were in accord with the high standards required of district judges under Fed. R. Civ. P. 52.

The second finding was that "appropriate civilian authorities be requested to investigate the alibi of Helena Stokely . . . [in regard to] . . . her whereabouts during the early morning hours of 17 February 1970 . . ." (*Id.*)

The report was filed by Colonel Rock with Major General Edward M. Flanagan, Jr., on October 13, 1970. The procedure followed subsequent to the filing is outlined in both the Manual for Courts-Martial (U.S. rev.ed. 1969) and the Uniform Code of Military Justice. The report was referred to the Staff Judge Advocate of the Fort Bragg commanding general. The Staff Judge Advocate had the authority to ask the prosecutors or the CID to comment or note objections to the report. This was part of the Staff Judge Advocate's function of advising the commanding general on proper disposition of the case. No such objections were made.

Before concurring in, or disapproving of, the findings and conclusions of Colonel Rock, the commanding general was required under the Uniform Code of Military Justice to make a full, independent judicial review of the matter. He had the authority to reject the findings of Colonel Rock if they were not supported by the record. He also had broad discretion to reject the results of the Article 32 proceedings if he found them unacceptable for any reason.

If the commanding general and his legal adviser had concluded that the findings were based upon an incomplete investigation or incomplete presentation of evidence by the prosecutors, he could have remanded the matter to Colonel Rock for further proceedings to deal with the unanswered issues. He also could have ordered a totally new investigation if he had concluded that the government's investigation was incomplete.[22]

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22. The commanding general had the power at any time to suspend the Article 32 proceedings or to order them reopened for further investigation. He could have done this on his own motion or at the request of the prosecutors. Military Justice Handbook, Dept. of Army Pamphlet 27-8, at 49 (1957).

Yet, on October 23, 1970, the commanding general formally entered an order dismissing the charges against Dr. MacDonald. On October 28, 1970, Dr. MacDonald was released from confinement.

F. Release of Dr. MacDonald from the Army.

Dr. MacDonald's two-year term of service in the Army was to end in June 1971. However, following the dismissal of the charges against him, he applied for a hardship discharge. The government not only could have refused to grant him an early discharge, but it had the power to retain him in the military service beyond his normal discharge date for the purpose of investigating criminal charges against him.[23]

The sequence of events established that the Army had sufficient confidence in the Article 32 proceedings and in the independent review of the entire matter by the commanding general and his legal advisers to grant Dr. MacDonald's request. On December 6, 1970, he was honorably discharged from the Army.

G. The CID's reinvestigation.

The dismissal of the charges against Dr. MacDonald, however, did not end the CID's investigation of the crime or of Dr. MacDonald. Promptly after Dr. MacDonald's release from service, the CID, in January 1971, undertook a reinvestigation of both the crimes and its own investigatory processes. And, as we shall see, it promptly focused on Dr. MacDonald as if the entire Article 32 proceedings were merely a prologue.

As the foundation for this reinvestigation, the CID agents had large amounts of data already at their disposal. There was

23. *See* Army Regulation AR 600-31. The procedure of holding an officer in the service beyond the expiration date of his term of service for criminal investigation was utilized in the case of Lt. William Calley, who was extended on active duty while the Army was determining whether charges were to be brought against him.

a complete CID investigative file assembled from February 17, 1970 through the end of the Article 32 proceedings. Voluminous CID crime laboratory reports were available, as were reports of FBI and local law enforcement agency investigations. Of course, there also existed nearly 2,000 pages of Article 32 transcript, which included defense evidence. The reinvestigation did not need to begin, nor did it, with a tabula rasa.

The CID reinvestigation also began with the benefit of the legal insights and experiences of the Army prosecutors and Staff Judge Advocate personnel who had participated in and reviewed the Article 32 proceedings. In addition, the CID had the benefit of its own staff judge advocate, who is a military lawyer specifically assigned to give legal guidance to CID personnel in the conduct of CID business. Finally, the record shows that the full experience of the Department of Justice and the FBI laboratory was available and utilized by the CID in conducting the reinvestigation.[24]

During the course of the reinvestigation, the Justice Department requested that the CID submit various items of clothing worn by Colette, Kristen, Kimberly and Jeffrey MacDonald to the FBI laboratory for further analysis. Other items were submitted to the Treasury Department. And, large numbers of other

24. There has been considerable inconsistency in what the government has represented to various courts regarding Department of Justice and FBI laboratory participation in this case. On the one hand, the government represented to the Fourth Circuit that the FBI laboratory was involved as early as 1971. Government brief, 4th Cir., at 60-61. On the other hand, the Assistant United States Attorney represented to the magistrate at respondent's bail reduction hearing that the FBI laboratory had become involved only in 1974, because somehow or other, "government bureaucracy" kept the FBI laboratory from working on the case until the convening of the grand jury. *See* A. 111. *See also United States v. MacDonald, supra,* 531 F.2d at 201. In its Petition for Certiorari to this Court, the government now claims an early and strong guidance by the Justice Department over the CID reinvestigation. *See* Pet., at 9-10. It is of course a matter of public knowledge that the FBI is part of the Department of Justice.

items of evidence were resubmitted to the now-maligned ("they do not have the sophistication that the FBI Lab has," A. 111) CID laboratory. Most of this lab work was completed by mid-1971.[25]

The CID reinvestigation, presumably with the concurrence and advice of the Department of Justice and the various government attorneys who had been involved in this case, very early in 1971 again narrowed its focus to Dr. MacDonald. On February 19, 1971, Dr. MacDonald, at the CID's request, submitted to further questioning by CID agents, who first warned him that he was a suspect in the murders of his family.[26] He was questioned for several hours. The CID requested a second opportunity to question Dr. MacDonald and he again submitted to an interrogation on March 20, 1971.

In addition to reinterviewing Dr. MacDonald, all persons involved in the original CID investigation were reinterviewed. There were also a large number of new interviews. In all, the government has represented to this Court that 699 interviews or reinterviews in 30 states and several foreign countries were con-

25. The FBI lab report regarding the victims' clothing bears a date of July 2, 1971. There simply can be no doubt that all the government's physical evidence submitted to the grand jury in 1974-75 was available for laboratory analysis in 1970-71, and that government laboratories were available to analyze that evidence from 1970 onward.

26. From the early morning hours of February 17, 1970 through the return of the indictment against him on January 24, 1975, Dr. MacDonald has been questioned and interrogated by government agents at least eight times (including extensive cross-examination and psychiatric evaluation by government psychiatrists). He has never refused to answer the questions of government investigators, and he has never exercised his Fifth Amendment right against self-incrimination. In addition, the government is aware of interviews Dr. MacDonald has given to the press—indeed, he was questioned before the grand jury about those interviews. The government concedes that Dr. MacDonald has "presented essentially the same version of [the crimes] from his initial interview on the morning following the murders to his appearances before the grand jury in 1974 and 1975." Government brief, at 64.

ducted by the end of 1971. (Government brief, at 11) The reinvestigation started January 21, 1971 and was completed December 6, 1971.

Although the government suggests in its brief that no government agent could (or would) make up his mind what should be done with the case,[27] there is no suggestion that any further "new" evidence was collected past December 1971, or that Dr. MacDonald ever was dropped as the CID's prime suspect. Indeed, every piece of *physical* evidence that was considered by the CID reinvestigation had been in existence at the time of the Article 32 proceedings in 1970. So the government had over a year—until December 1971—in which to reevaluate that physical evidence.[28]

Thus, December 6, 1971[29] for practical purposes marks the end

27. The government has never made the CID reinvestigation report available to the respondent, and that report is not part of any record in this case. The government apparently has chosen selectively to "disclose" what it feels is beneficial, while keeping in its breast the entire contents of that report. *See* Government brief, at 11 n. 8.

28. At various times, the government has attempted to disguise this fact by reference to "new" laboratory analysis of existing evidence. *See, e.g.,* Government brief, at 11-12. But what must be borne in mind is that the evidence has always been there since 1970, and the government has always known that this evidence is the key to its case against respondent. *See* A. 110-111. Before various courts, including the magistrate at Dr. MacDonald's bail reduction hearing, and before the Fourth Circuit, the government has sought to show that it was a lack of adequate laboratory analysis that is to blame for the delay in this case. But the fact remains, the CID laboratory has been involved here since 1970, and the FBI laboratory has been involved at least since mid-1971, when the Department of Justice directed that the CID submit certain physical evidence to the FBI. The "supplemental" reports referred to in the government's brief in the Fourth Circuit and here are reports of tests and reinterpretations of evidence which has never changed since 1970, and which was presented to the Article 32 investigation. The representation by the Assistant United States Attorney in 1975 and the innuendo of the government's brief to this Court at 13 that only the convening of the grand jury somehow could cut through "government bureaucracy" and get the FBI laboratory involved, is belied by the fact that the FBI laboratory was involved at least since 1971.

29. Government brief, 4th Cir., at 59.

of all the evidence-gathering that has ever been done in this case. June 1972 marks the end of whatever "analysis" was done of this evidence. Beyond that point, nothing happened that could not have reasonably been done, even at a leisurely pace, before. By June 1972, there was within the grasp of Justice Department lawyers the material with which to make a decision: investigative files of the CID; an Article 32 transcript and report; various CID, FBI and Treasury laboratory reports; and a "massive" CID reinvestigation report.

H. Dr. MacDonald under continuing public accusation.

Within two months after his discharge from the Army, Dr. MacDonald was made acutely aware that he was still actively being investigated for the murders of his family when he was interrogated by CID agents conducting the reinvestigation of the case.

Not only did he know he was under the cloud of continuing accusation, but newspaper readers in New York (where Dr. MacDonald was then residing), in North Carolina and elsewhere were also aware that the government's accusation against him was still pending. Newspaper stories describing the ongoing investigation and likely early reprosecution of him appeared frequently from 1971 to the date of the indictment.[30]

In an effort to bring to an end the effects of the ongoing accusation against him, Dr. MacDonald made attempts to have the case resolved. (*United States v. MacDonald, supra,* 531 F.2d at 207) His first effort to have the government expedite a decision as to him was in January 1972. (A. 28, 44) His attorneys made unsuccessful continuing efforts to obtain meetings with Justice Department attorneys in order to obtain a resolution of the case. (A. 59-

30. *See* references thereto at A. 89-90, 105. *See also, e.g., Raleigh* [N.C.] *News and Observer,* January 31, 1973, p. 1 and February 1, 1973; *New York Daily News,* March 16, 1973, p. 3.

60) They wrote the Department a series of letters between 1972 and 1974, inquiring about a final decision on the prosecution in order to relieve "the unfounded suspicion" to which Dr. MacDonald was being subjected. (*United States v. MacDonald, supra,* 531 F.2d at 201 nn. 5 & 6; *see* A. 89-109 for the complete text of these letters.)

Beginning in January 1972 and continuing through January 1974, Dr. MacDonald repeatedly offered to submit to interviews by the government attorneys in charge of the case in order to bring to a conclusion the pending accusation against him. (*United States v. MacDonald, supra,* 531 F.2d at 201)

The government's attorneys declined to question him. They also would not advise him when their investigation would be completed. The correspondence with the Department came to an end in January 1974, "leaving MacDonald in suspense." (*Id.* (footnote omitted))

In August 1974, Dr. MacDonald was the first witness subpoenaed to appear in the grand jury proceedings relating to the murders. He waived his right to remain silent and testified on two occasions for a total of more than five days.

I. The Department of Justice delays from June 1972.

By June 1972, the Department of Justice had in its possession the massive 13-volume report of the CID reinvestigation. The government has put forth three different explanations for the thirty-month delay that followed until the indictment was returned.

The primary explanation of the government has been that the delay was necessary in order to have more laboratory work done on the physical evidence; that the CID laboratory was not sophisticated enough to do this work but that the FBI laboratory was;[31] and, that it was not until the grand jury investigation that the

31. Implicit in the government's arguments to this Court is the suggestion that the work product of the CID laboratory was not considered

FBI laboratory had come into the case. (*United States v. MacDonald, supra,* 531 F.2d at 206 n. 18; *see also* A. 110-111)

The record discloses, however, that the FBI laboratory was available to perform examinations on the physical evidence from the day the investigation of the crimes began in February 1970, onward. During the CID reinvestigation in 1971, done at the direction of the Department of Justice, the FBI laboratory conducted numerous examinations of the physical evidence at the request of the Department. (Government brief, 4th Cir., at 60) Only one explanation was offered in the record why the FBI laboratory did not conduct further examination of the evidence from December 1971 until the grand jury proceedings in 1974, and that was "because of government bureaucracy." (*United States v. MacDonald, supra,* 531 F.2d at 206 n. 18 and accompanying text; *see also* A. 111)

A second explanation put forth by the government for the delays in the Department of Justice was the need for its attorneys to become familiar with the case, as it passed the MacDonald file from one attorney to another. The Deputy Assistant Attorney General of the Criminal Division described the process: "The case was assigned and reassigned to various staff attorneys, of the General Crime Section, who repeatedly reviewed and rereviewed the matter." (A. 87; *United States v. MacDonald, supra,* 531 F.2d at 206) There is no indication that the reviewing and rereviewing by the attorneys added substantively to the case file.

However, United States Attorney McNamara, who had been unfamiliar with the case until his appointment late in the fall of

the type of "final" work that would have been used at a trial in the case of the seriousness of the MacDonald murders. Such a suggestion is without any basis in the record of this case, or in fact. It presents the rather novel situation of the Department of Justice itself casting doubt on the validity of the work done by this important facility. Since the CID laboratory is the principal scientific investigative agency for the Army, and since its work has been offered to support convictions in innumerable serious courts-martial proceedings throughout the world, the government's suggestion in this case can only be considered disingenuous.

1972, became sufficiently familiar with the case (including making personal visits to the scene of the crime) to submit by March 14, 1973 a fifty-four page memorandum to the Department recommending prosecution of Dr. MacDonald. (Government brief, 4th Cir., at 62; *United States v. MacDonald, supra,* 531 F.2d at 206)

McNamara also requested the Department to assign a full-time, experienced trial lawyer to assist his office. (Government brief, 4th Cir., at 62) Instead, the Department assigned another attorney "to evaluate the case, and Mr. McNamara's recommendation." (Government brief, 4th Cir., at 62-63)

In May 1974, the Department reassigned the case again, this time to attorney Victor C. Woerheide. In approximately one month, he was able to read the entire CID file, visit the crime scene, examine the physical evidence, and consult with the United States Attorney and the Chief Judge of the District Court in regard to the case. In August 1974, he commenced presenting evidence to the grand jury. (Government brief, 4th Cir., at 63-64)

The third government explanation, and the one now put forward to this Court, is that it required until late May 1974 for the Department to conclude that there were many unanswered questions in the case and the use of "the broad investigative powers of the grand jury" was the only means by which they could be resolved. (Government brief, at 12)

There are no facts in the record which explain why it required a twenty-six month delay from the filing of the CID reinvestigation report until the convening of the grand jury, except that the file was passed from one Justice Department attorney to another. Moreover, there is reason to believe that fourteen months earlier the Department of Justice had reviewed and rereviewed the case sufficiently to make a conclusion as to the need for a grand jury. A New York newspaper reported that "Highly placed sources in the Justice Department said new evidence has been uncovered in the case and that a decision on whether to submit the matter to a federal grand jury would be made within two to five weeks." *New*

York Daily News, March 16, 1973, p. 3 under byline of William Sherman.

The government has described the grand jury investigation as leading to "a number of significant discoveries." (Government brief, at 12) The two discoveries described, however, deal only with physical evidence that had been in its possession since 1970. One "discovery" was an experiment with the holes in Dr. MacDonald's pajama top;[32] the other was a naked-eye examination of a bed sheet which led to an opinion that there was a clothing impression on it. There is nothing in the record to indicate why a grand jury investigation was needed to obtain these opinions from FBI laboratory personnel.

The grand jury was not convened to seek further testimony from Dr. MacDonald. There is no basis to believe that the government was seriously interested in his statements after the CID reinterviews of 1971. The Department had rejected his repeated offers, over a two and a half year period, to submit to full questioning by its attorneys. (*United States v. MacDonald, supra,* 531 F.2d at 201 nn. 5 & 6 and accompanying text; *see also* A. 89-109)

An examination of the list of witnesses actually called before the grand jury reveals that it was essentially a replay of the testimony of the Article 32 proceedings. (Government brief, 4th Cir., at 65-66) The government called all twenty-seven of the witnesses that had testified for it in the military proceeding. It also called various additional Army personnel who were known and had been interviewed by the CID in 1970, but whose testimony was determined by the prosecutors not to be necessary. The significant omissions from among the Article 32 witnesses were most of the defense witnesses, including those who had testified to the nature of the relationship between the MacDonalds.

That the grand jury was not in truth an "investigative" one is demonstrated by the fact that it did not call Helena Stokely,

32. The FBI laboratory had examined the pajama top as early as June, 1971.

whose activities Colonel Rock specifically recommended be investigated. The grand jury's "broad investigative powers" were notably unused in this case to do anything but retrack old evidence.

The grand jury was convened and heard its first witness, Dr. MacDonald, on August 12, 1974. Within a month, the MacDonald investigation was recessed for five weeks so that one of the three government attorneys working with the grand jury could take a vacation. (Government brief, 4th Cir., at 64) Later, the grand jury was recessed again for several weeks because the adult son of the same attorney was suffering from illness.

The record indicates that the grand jury proceedings were characterized by a leisurely pace which appears to have been primarily for the convenience of government counsel. The grand jury returned its indictment against Dr. MacDonald on January 24, 1975.

SUMMARY OF ARGUMENT

I.

The court of appeals in this case had jurisdiction to hear Dr. MacDonald's speedy trial claim under this Court's holding in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) and the recent decision of *Abney v. United States,* 97 S.Ct. 2034 (1977). The claim that he was denied his right to a speedy trial is, like the double jeopardy claim in *Abney,* sufficiently independent of the merits of his case to permit immediate review. This is the same conclusion this Court had previously reached, at the urging of the government, in *United States v. Marion,* 404 U.S. 307 (1971).

In *Cohen,* this Court set forth those circumstances under which a court of appeals would have jurisdiction over an interlocutory appeal from the decision of a district court. In *Abney,* this Court explained and applied the principles of *Cohen* to allow a criminal defendant to bring an interlocutory appeal from the denial of his claim of double jeopardy. *Abney* held that for an order to be appealable within the meaning of *Cohen,* the decision of the district court must be final, must resolve an issue collateral to the

main cause of action, and must involve an important right which would be lost, probably irreparably, if review had to await final judgment. 97 S.Ct. at 2040.

Dr. MacDonald's claim fits these criteria perfectly, and the court of appeals' exercise of jurisdiction was therefore both correct and unremarkable.

The government argues that Dr. MacDonald's speedy trial claim is not collateral within the meaning of *Cohen* and *Abney* because it is not sufficiently independent of the outcome of the trial itself. Government brief, at 36. Yet, the government has previously argued with success the proposition that the speedy trial issue is an "extraneous factor," unrelated to the outcome of the trial or the accused's guilt or innocence. Government brief in *United States v. Marion*, No. 810, at 13 (1970). Furthermore, this Court agreed that the denial of a speedy trial was a factor having nothing to do with guilt or innocence. *United States v. Marion, supra,* 404 U.S. at 312.

This Court's analysis of whether speedy trial is an "extraneous issue" closely parallels its analysis in *Abney* of whether a double jeopardy claim is "collateral." When the two are compared, it becomes apparent that to rule that a speedy trial claim is not collateral would be a repudiation of the decisions in *Cohen, Abney* and *Marion*.

The government has suggested that the district court's ruling was tentative (until there was a trial), and therefore did not meet the finality test of *Cohen* and *Abney*. In doing so, the government ignores the admonition that the *Cohen* tests are to be given a practical rather than a technical construction.

This Court's ruling in *Strunk v. United States*, 412 U.S. 434 (1973), and the reasoning in *Abney* make it clear that this guarantee means the right to be entirely free from a trial that is a less than a speedy one. Therefore, the district court's refusal to vindicate Dr. MacDonald's Sixth Amendment right was, as was the decision

by the lower court in *Abney*, a complete and final rejection of the claim.

Cohen and *Abney* require that there be a need for immediate appellate review in order for the court of appeals to have jurisdiction. Were a trial wrongfully held in contravention of *Strunk*, Dr. MacDonald's Sixth Amendment right would be irretrievably lost. Thus, only immediate appellate review of the district judge's decision could effectively vindicate Dr. MacDonald's right to have the indictment against him dismissed without a trial.

This Court in *Cohen* held that interlocutory appeals should be allowed in cases where the "rights asserted in the action [are] too important to be denied review." 337 U.S. at 546. The speedy trial right is "as fundamental as any of the rights guaranteed by the Sixth Amendment." *Klopfer v. North Carolina, supra,* 386 U.S. at 223. Yet, the position advocated by the government would result in a right to a speedy trial which would be only available to the guilty, who could appeal after conviction. But, it would be a right which an innocent accused could never have vindicated. The notion that acquittal is a sufficient remedy for a speedy trial violation is at odds with this Court's view in *Klopfer* that dismissal of the indictment is the *only* fully satisfactory remedy.

The government also argues that if interlocutory appeals of speedy trial claims were allowed, there would be a burden on the courts of appeals. However, the government is only able to point to two interlocutory appeals of speedy trial claims in the past twenty-eight years.

II.

We agree with the suggestion of the government that if this Court concludes that the Fourth Circuit did not have jurisdiction to consider the respondent's speedy trial claim that it should vacate the judgment of that court and remand the case without considering the merits of that issue. Government brief, at 47-48. However, if the Court concludes that jurisdiction was properly exercised in regard to the speedy trial issue, then it is submitted that the judgment of the lower court should be affirmed.

In upholding Dr. MacDonald's contention that he was denied his right to a speedy trial, the court below relied upon the standards set down by this Court in *Barker v. Wingo,* 407 U.S. 514 (1972). The application of these criteria was precise, accurate and unexceptional. And, they were applied to a case that, on its facts, is concededly unique and extraordinary.

After having been formally accused of the murders of his family in 1970, Dr. MacDonald was not indicted for these offenses until January 1975. His case is one which presents the issue of whether a delay of nearly five years between public accusation and indictment constitutes a denial of speedy trial rights under the Sixth Amendment.

The government brief does not recognize this case as one brought under the Sixth Amendment. The government would have this Court believe that all the events that took place prior to the grand jury's activities in this case, including the Article 32 proceedings, the CID reinvestigations, and public knowledge of the continued accusation of Dr. MacDonald, were matters of virtually no consequence for speedy trial purposes.

Because this is a case under the Sixth Amendment, the court below was required to apply the test set down in *Barker v. Wingo, supra,* 407 U.S. 514. It did so, and on each of the four factors of that test found that they weighed heavily against the government.

The length of delay in this case between public accusation and indictment was nearly five years. It was extreme delay and compared favorably with the period in *Barker,* which this Court held was more than sufficient to serve as the "triggering mechanism" making it necessary to examine the remaining criteria. The government did not contest the conclusion of the court below on this factor.

The second of the *Barker* criteria to be considered is the reason assigned by the government for the delay. The government

has offered three different explanations. In its brief to this Court, the government contends that it needed from the end of the CID reinvestigation in 1972 until May 1974 to conclude that there were unanswered questions in this case which should be subjected to a grand jury investigation. In fact, the grand jury proceedings were a repeat of the Article 32 proceedings. The only "new" element was the testimony of FBI laboratory personnel presenting new opinions on the old physical evidence. It is clear that it was not necessary to convene a grand jury in order for the Department of Justice to obtain the opinions of the FBI.

The government also attempted to explain the five-year delay in having the physical evidence examined by the FBI laboratory as being the result of "government bureaucracy." And, its third explanation was that the delay was the result of the *MacDonald* file being passed from one government attorney to another for reviewing and rereviewing the case but never arriving at a resolution.

The court below found that the government had not satisfactorily explained the extraordinary delay and weighed this factor heavily against it.

The third factor considered by the Fourth Circuit in its *Barker* analysis was the accused's assertion of his speedy trial right. That court concluded that Dr. MacDonald's repeated requests to the Justice Department for a resolution of his case, and his willingness to submit to interrogation by government lawyers was an assertion of his speedy trial right.

The government's contention that an accused must demand to be prosecuted has been previously rejected by this Court in *Barker.*

Finally, the court below applied the *Barker* standard of whether there was prejudice to the accused arising from the extraordinary delay. It found, and the record amply supports the conclusion, that Dr. MacDonald has suffered actual prejudice as the result

of the altered memory of witnesses. He has also been prejudiced in his ability to defend himself which has been severely compromised because of the deterioration and the age of the physical evidence. It also found he had been prejudiced because of the anxiety and concern arising from being an accused for nearly five years.

The government's contention that only actual prejudice can support a speedy trial claim was rejected by this Court in *Moore v. Arizona,* 414 U.S. 25 (1973).

The government urges that because there was no formal charge against Dr. MacDonald from the end of the military proceedings until the return of the indictment that no speedy trial rights were implicated during that period. That argument must fail because there is no significant difference between the situation in *Klopfer v. North Carolina, supra,* and the one in the present case.

This Court in *United States v. Lovasco,* 97 S.Ct. 2044 (1977), said that the speedy trial right does not attach to pre-accusation delay because it is desirable to allow considerable discretion to prosecutors as to when charges should be brought. Having granted such latitude in the pre-accusation period, this Court cannot have intended to also excuse post-accusation delay from Sixth Amendment scrutiny.

ARGUMENT

I.

DENIAL OF RESPONDENT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS WAS A FINAL ORDER, IMMEDIATELY APPEALABLE, WITHIN THE MEANING OF COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP.

A. Introduction.

The court of appeals decision to allow respondent to present his speedy trial claim to that court was correct and supportable under the teachings of this Court's decisions in *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541 (1949), and *Abney v. United States,* 97 S.Ct. 2034 (1977). Although the Fourth Circuit phrased its exercise of jurisdiction, under 28 U.S.C. § 1291, as "pendent" and "closely related to" exercise of interlocutory appeals jurisdiction regarding respondent's double jeopardy claim,[33] the court of appeals also recognized that there was basis of jurisdiction independent of the double jeopardy claim.[34] Speedy trial, like double jeopardy, is one of "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546.

Contrary to its argument now, the government argued this very point to this Court in *United States v. Marion,* 404 U.S. 307 (1971). And the Court adopted almost *in haec verba* the position of the government: speedy trial is a truly collateral issue, capable of treatment by courts of appeals as completely separate from the merits of the case against a criminal defendant. The labored explanation why that is *not* the case, now offered by the government to this Court, should be rejected as a novel attempt by the government to undermine this Court's long-standing rule articulated in *Cohen* and followed in *Abney.*

B. The Cohen Standards.

This past term, the Court in *Abney v. United States,* 97 S.Ct. 2034 (1977), explained and applied the principles of *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. 541 (Jackson,

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33. Which the Fourth Circuit found to be "not fanciful," but declined to decide in view of its speedy trial decision.

34. The Fourth Circuit noted that Dr. MacDonald's claim "is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right." *United States v. MacDonald, supra,* 531 F.2d at 199.

J.) to allow a criminal defendant an interlocutory appeal from the denial of his claim of double jeopardy, but not to appeal a claim for dismissal of an indictment. The Court in *Abney* pointed out several factors which it reviewed to decide the question of "finality": (1) the district court's order must be "final" in that it does not leave the matter "open, unfinished or inconclusive"; (2) the district court's order must "resolve an issue completely collateral to the cause of action asserted"; (3) the district court's action must involve an "important right which would be 'lost, probably irreparably, if review had to await final judgment.' " 97 S.Ct. at 2040. These tests are to be given a "practical rather than a technical construction." *Id.*

Finally, in summary, the Chief Justice in *Abney* quoted the *Cohen* observation that, for interlocutory appellate relief:

> [The] decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 97 S.Ct. at 2040.

All of these criteria, when matched against Dr. MacDonald's speedy trial claims, fit perfectly. Thus, the Fourth Circuit's exercise of jurisdiction was unexceptional, and should be affirmed.

C. Respondent's Claim Of Denial Of His Speedy Trial Right Is Collateral To The Issues Of The Case.

In actuality, this Court has already decided that a speedy trial issue is collateral to the principal issue of guilt or innocence in a criminal proceeding. And, it decided that issue at the government's urging. It comes as something of a surprise, then, that the government now is asking this Court to overturn the prior decision for which it had argued so strongly.

In *United States v. Marion, supra,* 404 U.S. 307, as a preliminary matter, the Court was faced with a criminal defendant's

claim that there was no jurisdiction under the Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. V 1964) because the district court's granting of defendant's speedy trial motion was not a "decision or judgment sustaining a motion in bar . . ."

The government, which was urging that the Court had jurisdiction under that Act, argued that granting of a speedy trial motion did indeed sustain a motion in bar. In so arguing, the government's brief described with great articulateness what the nature of a speedy trial claim is, compared to the main issue of a criminal trial. "[T]he defendant [does] not deny that he had committed the acts charged or that those acts [constitute] a crime, but nevertheless [urges] that he [can] not be prosecuted because of some *extraneous factor,* such as the tolling of the statute of limitations *or the denial of a speedy trial.*" Government brief in *United States v. Marion,* No. 810, at 13 (1970) (emphasis added). In its reply brief in *Marion,* the government returned to this description of the speedy trial claim: "[Such a plea] sets up by way of defense a claim that bars conviction *whether or not the defendant is guilt.* [sic]" Government reply brief, at 3 (emphasis added).

The touchstone of the claim, then, as the government saw it in *Marion* was that a speedy trial claim makes no attempt to litigate the main issue of a case, *i.e.,* the guilt or innocence of the defendant. Rather it is totally separable from that issue, that is, *collateral to* ("extraneous" to) the guilt or innocence of the accused.

The Court agreed wholeheartedly with the government's position:

> The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some *extraneous factor, such as*

> the running of the statute of limitations or *the denial of a speedy trial. United States v. Marion, supra,* 404 U.S. at 312 (White, J.) (emphasis added).

When this Court last term faced the issue in *Abney,* of whether denial of a double jeopardy claim is a "collateral" matter, it articulated the "collateralness" test in almost exactly the same words as the "extraneous issue" phraseology of *Marion.* Below we quote from Chief Justice Burger's opinion in *Abney,* substituting the words "speedy trial" for "double jeopardy." We suggest that the match between *Marion, Abney* and *Cohen* is exact:

> [T]he very nature of a [speedy trial] claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, *i.e.,* whether or not the accused is guilty of the offense charged . . . . [T]he defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction . . . . Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. [Citations omitted] The elements of that claim are completely independent of his guilt or innocence.
>
> * * * * * *
>
> Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect or . . . be affected by, decision of the merits of the case." *Abney v. United States, supra,* 97 S.Ct. at 2040-2041.

Having admitted, indeed embraced and urged, in *Marion* the proposition that speedy trial is collateral ("extraneous") to the issue of guilt or innocence, it is disingenuous at best, and wrong at worst, for the government now to take the contrary view. More importantly, it would be a repudiation of this Court's decisions in *Marion, Abney,* and *Cohen* to sustain the government's position now.

The cases are clear: a speedy trial claim is "collateral" to the main issue of a criminal prosecution, and thus meets one of the *Cohen* criteria for interlocutory appeals.

D. The District Court's Order Denying Respondent's Speedy Trial Claim Was Final.

The government argues that denial of a speedy trial claim was not "final" at the district court level, and thus cannot meet the "finality" test of *Cohen* and *Abney.* That argument misses completely what the district court ruled in this case. And, it ignores this Court's admonition that the *Cohen* tests are to be given a "practical rather than a technical construction." 337 U.S. at 546.

In denying Dr. MacDonald's speedy trial claim, the district judge held *as a matter of law* that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion,* 404 U.S. 307 (1971), the motion of defendant is denied." Pet.App. 49a.

There is nothing tentative about this ruling. It does not, on its face or by implication, indicate that anything which might later happen at trial could affect it. The judge simply held that *under no circumstances* did speedy trial rights attach prior to the indictment of Dr. MacDonald by the grand jury.

While we have argued that the district court is wrong as a matter of law in this conclusion, we nevertheless think that the district court was at least correct in recognizing, as the government refuses to recognize before this Court, that the speedy trial right embraces more than a "due process" right to a fair trial. The district court's order does not say that respondent's *due process* arguments of prejudice at trial (should those arguments become necessary as a trial develops) would be rejected out of hand. Rather, what was rejected finally and conclusively in the district

court's order were the broader range of Sixth Amendment rights as we have described them. The order concludes that *none* of those rights are engaged until time of indictment. Nothing which happens at trial could affect that ruling.

The government's brief thus totally ignores the fact of what the district court decided and instead focuses on hypothetical cases where a district court *might* rule tentatively on speedy trial motions while indicating that further trial developments will be taken into consideration. Moreover, the hypothetical nature of the government's argument does not look at the "practical rather than a technical construction" of the *Cohen* and *Abney* finality tests.

It is now beyond arguing that, if a defendant has a valid speedy trial claim (just as if he has a valid double jeopardy claim), his constitutional right is a right *not to be tried at all.* This is the holding of the Court in *Strunk v. United States, supra,* 412 U.S. at 440, (Burger, C.J.), where the Chief Justice speaking for the Court (as he did in *Abney*) held that once a defendant's speedy trial right has been found to be violated, "dismissal must remain . . . 'the only possible remedy.' "[35]

35. Not only did this Court hold in *Strunk* that a speedy trial right is a right not to be tried at all (so that if the district court denies the right, that is "final rejection of a criminal defendant's . . . claim" because he will have to stand trial, even if he is later acquitted), but the government used that argument in its *Marion* brief and has operated under that result ever since. The government correctly pointed out in *Marion* that undue delay is, from an analytical constitutional viewpoint, a wrong done by the government for which there is no remedy (except of course dismissal). *See* Government reply brief in *Marion,* at 2. The Court agreed. 404 U.S. at 313.

The issue under discussion in *Marion* was whether preindictment delay triggered speedy trial rights. Analytically, however, it makes little difference when the right attaches for purposes of analyzing whether the right, once found to be violated, can be vindicated other than by dismissal. *Strunk* makes clear that there is no "curing" a violation of this right. It follows then that once a district court rules on a pretrial assertion of the right, whatever later happens at trial does not affect the facts which have already passed into history as, we are supposing, a transgression of the Sixth Amendment.

Again, what this Court said in *Abney* should be dispositive of the government's argument now. Regarding finality, if we again substitute "speedy trial" for "double jeopardy," the Court said:

> [T]here can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's [speedy trial] claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the [Sixth Amendment's] guarantee. Hence, *Cohen's* threshold requirement of a fully consummated decision is satisfied. 97 S.Ct. at 2040.

Thus, since the speedy trial right is a right not to be tried at all (*i.e.,* to have the indictment dismissed) if the right is found violated, the district court's refusal to vindicate that right was complete and final. At the district court level, nothing is left "open, unfinished or inconclusive" about what the district court's views on speedy trial were. That is particularly true here, where the district judge was absolutely clear that he was rejecting respondent's speedy trial claim as a matter of law, with no relation at all to the facts of the case. What he did, taken together with the rationale of *Abney* and *Cohen,* shows a "finality" in the district court's ruling which gave the court of appeals jurisdiction to review respondent's Sixth Amendment claim.

E. There Is A Need For Immediate Appellate Review Of The District Court's Order, Or Else Respondent's Speedy Trial Right Is Forever Lost.

As we have noted, the district court flatly rejected the speedy trial argument of respondent, and continued the march toward trial. But as we have also seen, if the lower court was wrong (as the Fourth Circuit found), if Dr. MacDonald had indeed

been denied his Sixth Amendment right, then he was on the verge of losing that right forever if his appeal could not be heard at that juncture. This conclusion must follow from an examination of the interests, as spelled out by this Court, which the speedy trial right was intended to protect. High among these was the interest in protecting an accused from prejudice, including that prejudice which arises from anxiety and concern, *Barker v. Wingo, supra,* 407 U.S. at 532, from public scorn, *Klopfer v. North Carolina, supra,* 386 U.S. at 222, and from obloquy, *Marion v. United States, supra,* 404 U.S. at 320.

This Court has referred to the same considerations in discussing the interests that the double jeopardy provision was designed to protect. *Abney v. United States, supra.* And it concluded that the double jeopardy claim must be reviewable pre-trial because the very occurrence of a second trial would subject the accused to anxiety, concern, public scorn and obloquy.

And so it is with the speedy trial right. If that right means anything it is to be entirely free from a trial that is less than speedy. Only immediate appellate review can vindicate the right to have the indictment dismissed without a trial. Thus, the third test of *Abney* and *Cohen* is met here.

F. The Speedy Trial Right Is "Too Important To Be Denied Review."

Justice Jackson, speaking for the Court in *Cohen,* articulated a reasonable, practical interpretation for interlocutory review of certain lower court decisions. We have already analyzed the standards which *Cohen* set forth, and have demonstrated that all of those standards apply to this case. However, a further comment is in order about the nature of the Sixth Amendment's speedy trial guarantee because the Court in *Cohen* said that interlocutory

appeals should be allowed in cases where the "rights asserted in the action [are] too important to be denied review." 337 U.S. at 546.

This practical constitutional advice was quoted with approval by the court in *Abney, supra,* 97 S.Ct. at 2040. The speedy trial right certainly falls within that category of important rights. It is specifically enumerated in the Sixth Amendment, and does not rest on any statutory basis.[36] This Court has held it is "as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage." *Klopfer v. North Carolina, supra,* 386 U.S. at 223. It is a right which is so fundamental and important that the only remedy for violation is dismissal of the indictment. *Strunk v. United States, supra,* 412 U.S. 434.[37]

The government's position before this Court denigrates this right into insignificance. With cavalier abandon, the government says that a post-conviction review of this most "fundamental as any of the rights secured by the Sixth Amendment" is all that is required. Government brief, at 37. What this overlooks is that an accused man who is found innocent of the charges *never* has his right vindicated. His acquittal, after the burden of trial, is supposed to make up for all the grief of an unconstitutionally long delay.

The government has, in a curiously offhanded way, articulated to this Court a speedy trial right which applies only to persons convicted of crimes. Innocent persons do not have any right to a speedy trial which can be enforced. That view cannot be espoused

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36. Compare this right with, for example, a statute of limitations right which the government apparently conceded in *Marion* would be a "collateral" issue within the meaning of *Cohen.*

37. Contrast this right, for example, with the right against illegal search and seizure where the remedy may be suppression of evidence, but the government may nevertheless pursue the trial.

by the Court while its holding in *Klopfer* stands. Certainly the Sixth Amendment was supposed by the framers to apply at least as much to innocent men as to guilty. By postponing relief until after conviction, the Sixth Amendment becomes only the refuge of the guilty. Such an important right cannot be laid to rest so summarily.

G. Interlocutory Appeals From The Denial Of Speedy Trial Motions Are A "Small Class" Of Criminal Matters Which Courts Of Appeals Should Dispose Of Promptly.

All of the criteria of *Cohen* and *Abney* are met by denial of speedy trial motions. Nevertheless, it is fair to inquire as to the practical effects of approving interlocutory appeals, although strictly speaking, as the government points out in its brief, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States,* 354 U.S. 394, 405 (1957) (quoted by the government in its brief, at 25). This, of course, is true even if appeal rights become a burden on courts and prosecutors. This specter, however, is not present here.

First, there are only a few matters in criminal cases which are amenable to interlocutory appeals under the *Cohen-Abney* line of authority. Of course, double jeopardy is one, as *Abney* held. Bail is another. *Stack v. Boyle,* 342 U.S. 1 (1951). However, it is difficult to think of other situations where all the tests of *Cohen* and *Abney* are met. A holding that speedy trial issues may be appealed pretrial does not, therefore, substantially broaden the number of issues which will face courts of appeals.

Second, the government's argument that speedy trial issues will swamp the courts of appeals with frivolous appeals is unsupported by any basis. As the government itself points out, only two reported federal cases have presented to the courts of appeals an interlocutory challenge to a denial of speedy trial motions since *Cohen* was decided in 1949. *See* Government brief, at 23.

There is no reason to think that this miniscule number of cases will suddenly explode should the Fourth Circuit's decision be affirmed here.[38]

The government argues that almost any criminal defendant can make a "colorable speedy trial claim." Government brief, at 46. Even if that were true, the courts of appeals can easily cope with such frivolous claims. The Fourth Circuit in this very case recognized that not every speedy trial claim merits full review. 531 F.2d at 199. While we do not urge that courts of appeals could pick and choose which speedy trial claims may be *filed* as interlocutory matters, we certainly do maintain that courts of appeals can and will develop a facility for screening out those claims which on their face are not so unique and compelling (such as Dr. MacDonald's case was) that full argument is required. Courts of appeals can and will quickly decide how to review frivolous claims as an interlocutory matter, leaving to post-judgment review any further developments which a defendant can show impacted him from a due process standpoint. *See United States v. Lovasco, supra,* 97 S.Ct. 2044. There is no reason to think that courts of appeals will be unable to cope with frivolous matters, and there is no reason to think that members of the defense bar will engage in non-productive dilatory tactics, as the government seems to argue.

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38. An inquiry made to the Division of Information Systems of the Administrative Office of the United States Courts revealed that the office no longer publishes figures on the number of interlocutory appeals taken to the courts of appeals. Such data were collected and published until 1970. Publication was discontinued thereafter, however, because of the small number of cases involved.

The figures for the year 1970, however, are of interest. In that year, a total of 291 applications were made for interlocutory appeals in *all* courts of appeals. The figure does not indicate, and data are apparently not available to show, what proportion of these cases were criminal matters.

History demonstrates that it is most often the government, not the defendant, that violates the speedy trial clause.[39] It should not overly concern this Court that the government hypothesizes that in the future the tables might be turned.

II.

THE DETERMINATION THAT RESPONDENT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WAS CONSISTENT WITH THE RULINGS OF THIS COURT

A. Introduction

In making its determination that the unwarranted five-year delay by the government had denied Dr. MacDonald his right to a speedy trial, the Fourth Circuit properly employed the standards enunciated by this Court in *Barker v. Wingo, supra,* 407 U.S. 514. *United States v. MacDonald, supra,* 531 F.2d at 202-208. It is undisputed that these standards are the appropriate ones by

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39. The government argues in its brief, at 47 n. 22, that this case illustrates the delay inherent in the appellate process. We suggest that in point of fact this case shows that it is the government, either through inefficiency or tactical advantage, that delays the criminal process:

1. The government complains of a delay of six months between the decisions of the district court and the decision of the court below. It omits the fact that this delay came in part from the request of the government that it be permitted to file an unprecedented response to the respondent's reply brief.
2. The government complains of the three months taken by the court below between the date of its decision and its denial of the petition for a rehearing. It omits the fact that a portion of that time represents an extension of time granted to the government to seek rehearing.
3. The government complains of the delay in this Court. It omits the fact that: (a) the government sought and obtained the maximum extension of time to file its jurisdictional statement; (b) that the government successfully urged this Court to hold this case for a year on the basis of an incorrect assertion that the issues would be resolved in another case; (c) that the government twice obtained extensions to file its brief on the merits; and (d) that despite the extensions it filed its brief late.

which to judge the Sixth Amendment claim that an accused has been denied his right to a speedy trial. *See Barker v. Wingo, supra,* 407 U.S. at 530; Government brief, at 58 n. 27.

The court below took the extraordinary facts of this case[40] and applied the *Barker* balancing test, in which it weighed the conduct of both Dr. MacDonald and the prosecution. The court found that each of the factors to be considered—that is, the length of the delay, the reason for the delay, the accused's assertion of his Sixth Amendment right, and the prejudice accruing to the accused—weighed in favor of Dr. MacDonald and against the government. A review of that analysis will show that the application of those criteria was both precise, and accurate and unexceptional.

B. The Length of Delay

The length of the delay, nearly five years from the formal accusation of Dr. MacDonald until indictment, was by any analysis an extreme one. He was arrested and charged with murder by the Army on May 1, 1970, therefore becoming an "accused" within the meaning of the Sixth Amendment, whereupon his speedy trial rights were triggered. *United States v. Marion, supra,* 404 U.S. 307. He was not indicted until January 24, 1975, more than four and one-half years later, only a few days less than five years from when the murders had been committed.

The Court in *Barker, supra,* 407 U.S. at 530, explained that the length of the delay is the "triggering mechanism" which determines whether it is necessary to consider the other three criteria. The Fourth Circuit pointed out that the "extraordinary" delay in *Barker* of five years was considered more than sufficient by this Court to require inquiry into the other criteria. *United States v. MacDonald, supra,* 531 F.2d at 205.

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40. Government's Memorandum in Opposition at 4 in *MacDonald v. United States, cert. denied,* 423 U.S. 926, 927 (1975); *United States v. MacDonald, supra,* 531 F. 2d at 199.

It also noted that in *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment had been considered "excessive." *United States v. MacDonald, supra*, 531 F.2d at 205. *See also United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972), *rev'd on other grounds, Strunk v. United States*, 412 U.S. 434 (1973).

The government in the present case has never denied that its delay of five years was sufficient in length to have served as the "trigger" for the remainder of the *Barker* analysis.[41]

While the period of unjustified delay in this case is more than three years, the *total* delay between the government's initial accusation of Dr. MacDonald and its indictment was nearly five years, or as long as that in *Barker*. It is undisputed that it is this entire period which is to be taken into account when deciding whether further examination is required. The Fourth Circuit was following the dictates of *Barker* when it concluded that:

> [T]he delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing [his] claim that he has been denied a speedy trial. *United States v. MacDonald, supra*, 531 F.2d at 205 (citation omitted).

The government argues that it should escape the effect of the five-year delay in this case because after the dismissal of the charges by the Army, there was no formal accusation pending against Dr. MacDonald. This is similar to the view of the lower court in *Klopfer v. North Carolina*, which had concluded that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody. 386 U.S. at 219.

41. The only observation which the government makes in this regard is that such a delay, in and of itself, is insufficient to establish the violation of the Sixth Amendment right. Government brief, at 58 n.27. Dr. MacDonald has never contended otherwise.

This Court explicitly rejected that view and held that it violated the right to a speedy trial because the failure to proceed with a prosecution "indefinitely prolong[ed the] oppression, as well as the 'anxiety and concern accompanying public accusation.'" *Klopfer v. North Carolina, supra*, 386 U.S. at 222, quoting from *United States v. Ewell*, 383 U.S. 116 at 120 (1966).

It is clear that the instruction of the Speedy Trial Clause, as articulated in the views of this Court in *Klopfer*, is that once there has been a public accusation—that is, prosecution has begun—the government has only two choices: either to bring the case to trial and verdict, or to terminate it by means such that the defendant cannot be tried again.

There is no middle ground, no legal limbo into which an accused may be cast after a public accusation while the government proceeds at a "leisurely pace . . . primarily for [its own] convenience." *United States v. MacDonald, supra*, 531 F.2d at 206. To tolerate such a situation is to expose an accused to every harm this Court warned against in *Klopfer*.

It is not inconsistent with public policy to require the prosecution to proceed expeditiously to a resolution of a case after the public accusation has been made. Cf. Government brief, at 60-61. It is the prosecutors who have broad discretion as to when to commence a case. It is they who control the timing for triggering an accusation. The decision of this Court in *United States v. Lovasco, supra*, 97 S.Ct. 2044, assures prosecutors that they are free to proceed with the investigation and evaluation of a case in an orderly manner, without concern for judicial second-guessing. Absent delay that amounts to a due process violation, any delay prior to charging will not be reviewed by the courts.

Conversely, implied in *Lovasco* is the notion that once an accusation is made, the prosecutor must thereafter proceed with due respect for speedy trial rights. Delay may still be necessary, and even justifiable after this point. But, any unusual delay will

require a strict accounting. And, it is to be measured by applying the standards enunciated in *Barker*.

C. The Reason For The Delay

The second *Barker* criterion which must be examined is the reason the government assigns for the delay. The weight to be given the reasons for delay will vary with each explanation. *Barker, supra,* 407 U.S. at 531. This Court offered some examples in *Barker* of acceptable and unacceptable reasons:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence . . . should be considered since the ultimate responsibility for the circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Id.* (footnote omitted)

Dr. MacDonald does not claim that the delay in his case was the result of a deliberate attempt by the government to hamper his defense. And, the government has not suggested that its five-year delay resulted because of a missing witness or a similar, related reason. Rather, the examination of the record in this case reveals that it is in the middle ground of negligence and indifference to Dr. MacDonald's constitutional rights that the cause of the delay in this case is to be found.

The government has taken varying positions at varying times in its effort to offer a suitable explanation for its delay. In its brief to this Court, the government contends that it took the Department of Justice until May 1974 to conclude that there were many unanswered questions in this case which could only be resolved by use of the investigative powers of a grand jury. Government brief, at 12.

A second explanation, which the government offered the Fourth Circuit and the magistrate at Dr. MacDonald's bail reduction

hearing, was that it took from 1970 to 1974 for the Department of Justice to get the FBI laboratory involved in the examination of the physical evidence. A. 111.

The third explanation the government offers for the delays was the need for Department of Justice attorneys to become familiar with the case as the MacDonald files were passed from one attorney to another. A. 87.

Close examination of each of these explanations finds them totally inadequate to excuse the extraordinary delay in this case.

The Department of Justice received the report of the CID reinvestigation in June 1972. But, the case was not being submitted to the Department for a first-time examination. It had been "monitoring" the case since shortly after Dr. MacDonald's arrest by the Army. Government brief, 4th Cir., at 57. When the issue was raised as to which federal law enforcement agency should conduct the reinvestigation of the murders, it was the Department that recommended in 1971 that the CID assume this responsibility. And, as the reinvestigation progressed, the Department was involved, including arranging for laboratory tests of the physical evidence by the FBI and Treasury Department. Government brief, 4th Cir., at 61.

Despite the fact that it had been involved in the case for two years, and that it had received the 13-volume report from the CID in 1972, the Department of Justice nevertheless still failed to act. Instead, the files were "assigned and reassigned" and "reviewed and re-reviewed" by a succession of attorneys. A. 87.

That the case was susceptible of being reviewed, evaluated and acted upon without years of delay is made manifest by the actions of the few persons who actually recognized the need for a decision.

Colonel Rock, after four months of Article 32 proceedings, and with 2,000 pages of transcripts, CID laboratory reports and other evidence, was able to review, evaluate and arrive at con-

clusions, and to prepare a 90-page report of his work in one month. A. 113, 136.

United States Attorney McNamara was appointed to his position in Raleigh, North Carolina, in September 1972. He was able to assume the duties of his office, of which the MacDonald case was only a part, and become familiar enough with the case to submit in March 1973 a fifty-four-page memorandum to the Department of Justice recommending prosecution and asking for the assistance of a trial lawyer. Government brief, 4th Cir., at 62.

Justice Department attorney Woerheide had the case reassigned to him in May 1974. He required only a month to read and evaluate the file, arrange for a grand jury, and be ready to start presenting evidence. Government brief, 4th Cir., at 63.

Even the CID, which took eleven months to complete the reinvestigation, was able to prepare and file its 13-volume report with recommendations in six months.

Nowhere in its brief does the government squarely confront the question of why it took more than two years after the filing of the CID reinvestigation report to arrive at a conclusion that there were still unanswered questions which needed to be submitted to a grand jury.

That the matter was essentially ignored by the Department is implicit from the government's brief:

> After these additional reports[42] were received, no significant progress in the investigation was made until May 1974,

42. The government concedes that there was no significant investigative activity between December 1971, when the CID finished its reinvestigation, and May 1974. The CID report was filed in June 1972. The passing reference to additional reports in the government's brief, at 68, is worthy of comment.

The "First supplemental report of investigation" concerned the results of a brief investigation of a vague "lead" from an informant. Government brief, 4th Cir., at 61-62.

The "Second supplemental report of investigation" concerned the effort of a government physicist to prove theoretically that the coffee table in the MacDonald living room would always turn upside down. Government brief, 4th Cir., at 62. He was unable to prove the proposition. *Cf.* A. 200-201.

> when it was determined to utilize the services of the FBI and the grand jury in a final effort to sift through the evidence and to reach conclusions about the case. Government brief, at 68.

In point of fact, the same questions that the government wanted a grand jury to "sift through" were the very questions which had been known to the investigators from the time the CID laboratory filed its reports in April 1970.

The suggestion that this sifting process could only be done through the use of the grand jury is unsubstantiated. The grand jury testimony was essentially a repeat of the evidence heard at the Article 32 proceedings, as revealed by the list of witnesses actually called. Government brief, 4th Cir., at 65-66. The only difference was the calling of FBI laboratory personnel to give new opinions about the old physical evidence.

But, of course, it is clear that the grand jury was not needed in order to obtain the opinions of the FBI. Government brief, 4th Cir., at 60.

A more candid explanation of the ongoing delays was offered by the Assistant United States Attorney, who was one of the three government attorneys who presented the evidence to the grand jury. He was challenged at the bail reduction hearing on the issues of the five-year delay and the absence of any new evidence in the case against Dr. MacDonald. In the colloquy that took place between the United States Magistrate and counsel for the government, he provided the answer:

> The Magistrate: But this evidence has been gone over—this evidence is four or five years old now . . .
>
> [Assistant United States Attorney]: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced *within the last five months* by the FBI Lab.
>
> The Magistrate: But that evidence—the analysis of that evidence was within the last five months, is that correct?

[Assistant United States Attorney]: Yes, sir. The evidence *was in existence the whole time*. The bloody sheet, the bath mat and the . . .

The Magistrate: The time—three to four years passed between the creation of the evidence and its analysis?

[Assistant United States Attorney]: That's correct.

A. 110-111 emphasis added.

When the Magistrate asked counsel for the government to explain the delay, he was told that "government bureaucracy" was to blame. A. 111.

The court of appeals did not misapply the criteria of this Court when it concluded that this is an unacceptable excuse for delaying the prosecution of Dr. MacDonald. "Government bureaucracy" is another way of saying that the Justice Department was unable to regulate itself and to meet the obligations imposed upon it by the Sixth Amendment to "move with the dispatch that is appropriate to assure an accused an early and proper disposition of the charges against him." *United States v. Marion, supra,* 404 U.S. at 313.

If the court of appeals had not rejected the "government bureaucracy" excuse in this case, then every government delay would have to be excused on the ground that it was the best that can be expected from inefficient, indifferent and even negligent prosecution agencies.[43]

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43. The Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, referred to in the Government brief at 61, has no applicability to the present case. Its effective date was July 1, 1975. The indictment of Dr. MacDonald was on January 24, 1975.

Although this statute was enacted as a further protection of the speedy trial rights of an accused, the government suggests a reading that would allow prosecutors the right to even greater delay than prior to its adoption. Under the government view, a prosecutor who has brought a charge and thereafter is unable to keep pace with the rather mechanical schedule in the Act, can avoid its sanctions by the expedient of dismissing the charges. Thereafter, the prosecutor could wait months or even years, then renew the prosecution and only have the time between the original accusation and the dismissal charged against him for the purposes of the Act. Such a result is clearly unacceptable.

Part of the "government bureaucracy" delay was due to the time consumed to allow a succession of attorneys to "become familiar" with the case. This was the third of the government's explanations for the delay. The affidavit of Deputy Assistant Attorney General Kevin T. Maroney described the process:

> The case was assigned and reassigned to various staff attorneys, of the General Crimes Section, who repeatedly reviewed and re-reviewed the matter. Numerous conferences were held . . . A. 87.

However, Mr. Maroney never explains what action, if any, the Department of Justice took as a result of this constant review and re-review of the matter. The government itself offered no reason why so many attorneys were used. Nor, when one attorney had studied the case, why he or she did not submit a recommendation as to the disposition to be made of the case. Yet, when the matter was finally turned over to a Justice Department attorney with instructions to proceed with the case, he was able to review all the files and commence the presentation of evidence to the grand jury within one month after being assigned to the matter.

Perhaps, as this Court suggested in *Dickey v. Florida,* 398 U.S. 30, 38 (1970), having too few lawyers may make some delay inevitable. But, a delay resulting from having too *many* lawyers is not inevitable.

As the Fourth Circuit noted "[w]hether one attributes the delay . . . to indifference, negligence, or ineptitude, it must be weighed against the government." *United States v. MacDonald, supra,* 531 F.2d at 206-207 (citations omitted).

D. The Accused's Assertion Of His Right

The third factor this Court laid down in *Barker* is the defendant's responsibility to assert his right. The court of appeals found that Dr. MacDonald had "consistently expressed a desire to have

the case resolved" starting as early as January 1972. Pet.App.B 24a. His attorney wrote letters to the Justice Department offering the government the opportunity to question Dr. MacDonald and asking for a final decision on the matter. Pet.App.B. 2a n.5, 10a n.6 & 24a.

The accused is not required, as the government seems to suggest, to "demand that [he] be indicted." Government brief, at 58 n. 27. Such a "demand-waiver" approach was categorically rejected in *Barker v. Wingo, supra,* 407 U.S. at 528-530. The Fourth Circuit observed:

> A person in [Dr. MacDonald's] position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. *United States v. MacDonald, supra,* 531 F.2d at 207 (citations omitted).

Dr. MacDonald did more than just urge the Department of Justice to come to a resolution of the case. He also held himself open for interrogation by prosecutors in the hope that this would expedite the resolution he so anxiously sought.

Nor did Dr. MacDonald ever, in any way, attempt to obstruct or delay the investigation of the murders. In the total spectrum of criminal investigations, his cooperation can only be called extraordinary. Dr. MacDonald has voluntarily submitted to interrogation by the government at least eight times over five years. Immediately after the murders in February of 1970 he gave statements to both the FBI and the CID. In April of 1970, after being given *Miranda* warnings, he again agreed to be questioned by CID investigators. In the course of the Article 32 proceedings, he testified at length and was subjected to intensive cross-examination by prosecutors. He was also questioned in detail by Colonel Rock. Dr. MacDonald also was interviewed for four days by Army psychiatrists about the murders.

After his discharge from the military, when he was no longer subject to the Army's jurisdiction, Dr. MacDonald twice agreed to interviews with CID investigators despite warnings he was still the suspect in the murders. He repeatedly offered, from 1972 through 1974, to submit to questioning by attorneys of the Department of Justice. A. 89-109. And, when the grand jury was convened, he testified before that panel on two occasions for over five full days. At no time did Dr. MacDonald ever assert his privilege against self-incrimination.

The record provides ample support for the conclusion of the Fourth Circuit that "[b]oth the facts . . . and the law . . . warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial" Pet.App.B 24a. By any reckoning, this factor, too, must weigh heavily on respondent's side of the balance. *Barker v. Wingo, supra,* 407 U.S. at 531-32.

E. Prejudice To The Accused

The fourth factor this Court laid down in *Barker* for judging speedy trial claims is one of prejudice to the accused. In discussing this factor, this Court said:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker v. Wingo, supra,* 407 U.S. at 532.

Dr. MacDonald has twice been subjected to confinement for a total of more than six months as a result of these charges. However, this Court has specifically held in *Klopfer v. North Carolina, supra,* 386 U.S. 213 that oppressive pretrial confinement is not required for relief under the speedy trial portion of the Constitution.

But, the real damages to Dr. MacDonald have been the continuing anxiety and concern over a five-year period generated by the government's gross indifference to the need for a final resolution; and most important has been the damaging effect of the delay on his ability to defend himself.

1. ACTUAL PREJUDICE—THE MEMORY OF WITNESSES

There is no requirement that Dr. MacDonald prove actual prejudice to his defense from the government's unjustified delays in order to vindicate his Sixth Amendment right to a speedy trial. *Moore v. Arizona,* 414 U.S. 25 (1973). Nevertheless, actual prejudice does exist in this case and is a factor that must be weighed heavily against the government.

The Fourth Circuit found that Dr. MacDonald's "claim that his ability to defend himself has been impaired is not unfounded." *United States v. MacDonald, supra,* 531 F.2d at 208. The lower court noted the serious problem of unreliability of witness memory many years after a crime. There should be no dispute over its observation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details." *Id.*

The concern over faded memories is particularly acute in this case because the witnesses are asked to recall minute details and fragmentary matters, the importance of which were not likely to have been apparent at the time they occurred. Yet, the government seeks to resurrect and reconstruct such memories five years after the events and piece them into a circumstantial evidence case against Dr. MacDonald. This is markedly different and more dangerous than asking a witness, even five years later, to describe an event of some significance to that person, such as being the victim of a crime or observing an extraordinary event.

The Fourth Circuit pointed out some of the details around which the government's case is built and which are subject to

unreliable memory after a five-year delay: the position of the flower pot in the living room as it was observed by the first persons on the scene prior to the crime scene being disturbed; the manner in which Dr. MacDonald's pajama top was folded; the condition of the sheets and bedding in the bedroom where Mrs. MacDonald was killed. *United States v. MacDonald, supra,* 531 F.2d at 208.

But even more telling confirmation of the danger of altered memories is found in discovery materials turned over to Dr. MacDonald's counsel after the case had already been submitted to the Fourth Circuit.[44]

The assaults on the MacDonald family were made with several knives, an ice pick and a club-like stick. The stick was identified as being a piece of scrap lumber stored in the rear of the MacDonald house near an unlocked door. A. 139. But until the grand jury proceedings none of the other weapons were identified as belonging to the MacDonald household. The government, in its effort to discount Dr. MacDonald's statements that the crimes had had been committed by intruders, attempted to show that all of the weapons were, in fact, from his home. A. 145.

One person who potentially could have made this connection was Pamela Kalin, a next-door neighbor and babysitter for the MacDonalds. She was called, in fact, as a prosecution witness in the Article 32 proceedings, but was not asked to identify any of the weapons used in the assaults. A. 157-158. There is substantial reason to believe that she had been interviewed earlier by the CID and had already said she could not make such an identification.

Pamela Kalin also had been interviewed in June 1970 by one of the then military defense counsel, Michael J. Malley. She was

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44. Although the government had agreed during the pretrial proceedings in the district court to provide the defense with the grand jury testimony of certain witnesses, it had failed to do so at the time of the oral argument in the court below. Following critical comments from the bench, the government at a subsequent date released this material in accordance with the agreement between the parties. However, it was not available to the lower court.

shown government-supplied photographs of the two knives, ice pick and club. But, Kalin stated that she could not identify any of these items as coming from the MacDonald home. *See* Affidavit of Michael J. Malley, Appendix A of this brief.

However, when she was called as a witness before the grand jury more than four years later, her memory had changed markedly and favorably for the government. In fact, her memory improved between her first appearance before the grand jury in the morning and her second appearance in the afternoon.

In her morning appearance, she stated that she now believed that the MacDonalds had an ice pick. However, she did not know where it was kept in the house, and she could not identify an ice pick shown to her by government counsel as resembling the one she now remembered as being at the MacDonalds'. Grand Jury transcript, Pamela Kalin, August 27, 1974, at 23.[45]

When recalled that afternoon, however, she was able to remember that the ice pick did resemble the one being shown to her by government counsel before the grand jury.[46] *Id.* at 39. Her memory also changed to the extent that she even had a recollection as to where the ice pick was kept in the house. *Id.* at 38.

Kalin also testified in the afternoon session that she was able to identify one of the knives used in the assults as coming from the MacDonald home. *Id.* at 24.

Finally, Kalin said that she recognized the "splattered paint" on the club used in the assaults because it now "rings a bell" in her memory. *Id.* at 22.

The change in Pamela Kalin's memory after five years can only be viewed as a dramatic enhancement of the government's case.

45. The portions of the grand jury transcript referred to in this brief are reproduced and attached hereto as Appendix C.

46. The examination of this witness before the grand jury by government counsel was characterized throughout by heavy-handed, leading questions.

It has all the indications of being an instance of a witness without actual, current memory of events, responding favorably to the intensely suggestive questioning of the prosecutors. But, under any circumstances, it is the type of altered memory that prejudices Dr. MacDonald within the *Barker* standard.

2. ACTUAL PREJUDICE—THE PHYSICAL EVIDENCE

The physical evidence always has been the heart of the government's case from the beginning of the investigation in 1970. And, it is clear that the defense would be required to meet this evidence directly; that is, to show that errors in the examination of the physical evidence have led the government to a series of erroneous conclusions about the circumstances of the MacDonald family killings.[47]

Two of the key elements of the government's physical evidence are the identification of blood stains and the identification of wax drippings found in one bedroom.

The government's theory is that because minute blood stains of members of the MacDonald family were identified in rooms other than where their bodies were found, that indicates they had been moved after being killed, and it is unlikely that intruders would have done this.[48]

The failure of the government to identify the wax drippings found on the bed clothes in Kimberly MacDonald's bedroom was

47. The results of a nationwide study conducted under the auspices of the Law Enforcement Assistance Administration of the Department of Justice, and dealing with the accuracy of blood identification by crime laboratories was publicly released earlier this year. It revealed an appallingly high rate of error in such identification. *See* Law Enforcement Assistance Administration, *The Laboratory Proficiency Testing Program,* prepared for the Department of Justice, National Institute of Law Enforcement and Criminal Justice, under Grant No. 74-NI-99-0048, Dec. 1975.

48. Yet Colonel Rock observed in his report that there were "logical explanation(s)" for the location of blood types. A. 139. These include the fact that the blood could have been "carried" by the MP's, hospital personnel, intruders, or innocently by Dr. MacDonald. A. 143-144.

listed by Colonel Rock in the summary of his findings as an evidentiary factor "supportive of the accused." A. 137. The government would be expected at a trial to offer evidence as to the source of the wax.

But, while the government is prepared to build its case with these particular items of physical evidence, the ability of Dr. MacDonald to defend himself on these crucial matters has been irretrievably impaired.

Dr. John I. Thornton, a forensic scientist on the faculty of the University of California, has examined all the CID, FBI and Treasury laboratory reports in this case. Dr. Thornton states that important, sophisticated tests for the accurate identification of the blood and other physical evidence were not made by the government and are no longer possible by the defense because of the delay between the collection of this evidence and the indictment in 1975. He has also reported that the validity of defense examination of wax, if made as late as 1975, would be open to serious scientific attack by the prosecution because of the deterioration of the evidence. Dr. Thornton states:

> [T]he protracted delay imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and that the physical evidence is not capable in all regards of being utilized by the defense.
>
> He adds:
>
> The availability of such test results could be of value in assisting the defense.[49]

Dr. MacDonald's ability to defend himself has thus been impaired because of deterioration and changes in the physical evidence during the unjustified five-year delay in this case.

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49. Dr. Thornton's Declaration is attached hereto as Appendix B.

3. PREJUDICE ARISING FROM THE ANXIETY AND CONCERN OF THE ACCUSED

Even the termination of the military proceedings against Dr. MacDonald and his release from detention "did not . . . dispel the effects of the government's initial accusation." *United States v. MacDonald, supra,* 531 F.2d at 204. The court below pointed out that "MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him." *Id.* And, as a result Dr. MacDonald also suffered intangible, but nonetheless real, prejudice as outlined by the Court in *Klopfer* and *Barker.*

He has had to live now for more than seven and one-half years with "anxiety and concern" of this unresolved prosecution, *Barker, supra,* 407 U.S. at 532, and with the public scorn, *Klopfer, supra,* 386 U.S. at 222, and obloquy, *Marion, supra,* 404 U.S. at 320 because during this extraordinary delay he has remained, in the government's view, the only suspect in the murders of his wife and children.

The extent of anxiety and concern felt by an accused is a function of the seriousness of the charges. It is difficult to conceive of any accused being under greater stress than one charged with first-degree murder, unless it is a defendant charged with the triple homicide of his own family.

The government, of course, recognized that its accusation against Dr. MacDonald in 1970 generated enormous anxiety and concern in him and his family. Government brief, at 50-51. Having triggered this effect, the government has maintained it by the continuing failure to bring the case to a conclusion until five years had elapsed.

Dr. MacDonald attempted to relieve his sense of constant oppression by urging a speedy resolution of the case. He repeatedly offered to make himself available for unlimited questioning in order to expedite the decision-making. The only response to

his call for resolution was government procrastination. The only response to his offers to be interrogated was government rejection.

While the Justice Department was ignoring Dr. MacDonald, others were not. The fact that the government unwaveringly pursued him as the murderer of his family was periodically made a matter of public awareness by newspaper stories appearing in New York, North Carolina and elsewhere.[50]

Dr. MacDonald was born and raised in the New York area, and served his internship there immediately before entering the Army. He returned to New York after his honorable discharge in 1970, but concluded that because of the persistent interest of the media in the pending accusation against him, the only way to rebuild his life was to move to California. There, he thought, less likelihood existed of having to regularly confront public awareness of the murder accusations. Ultimately the anonymity he sought in California was also stripped from him by local newspaper accounts of the continuing accusation against him.[51]

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50. Two examples of this are news stories that appeared in the *Raleigh* [N.C.] *News and Observer* at a time when there was no specific news event occurring.

A front-page story appeared on January 31, 1973 detailing the military proceedings and the on-going accusation against Dr. MacDonald which was expected to lead to an indictment. The article quoted an informant as saying that the Department of Justice "know(s)" Dr. MacDonald "did it." And, it also reported that Dr. MacDonald had moved to Long Beach, California.

A second story, essentially similar in content, appeared February 1, 1973.

A third example is the article which appeared in the *New York Daily News,* March 16, 1973, p. 3, under the headline "Eye Murder Case of Ex-Army Doc."

Even the present case before this Court caused a California newspaper to headline "Manson-Style Killings—Did the Doctor Do It?" followed by a sub-head that read "His wife and daughters were stabbed and his story is full of holes." *San Francisco Examiner and Chronicle,* October 23, 1977, section A, p. 7. The story was based on the brief that was filed by the government in this Court.

51. Transcript of bail hearing, January 29-30, 1975, at 55-56, 71.

The record offers moving examples of the public opprobrium suffered by Dr. MacDonald because of the extraordinary delays by the government.[52]

It was apparent to the court below that by the criteria set forth in this Court's speedy trial cases, dealing with intangible as well as tangible prejudice to an accused, Dr. MacDonald has suffered prejudice from the unwarranted delay in bringing his case to trial. This factor is properly weighed against the government.

CONCLUSION

For all of the foregoing reasons, the respondent, Dr. Jeffrey R. MacDonald, respectfully submits that the judgment of the court of appeals be affirmed.

Respectfully submitted,

BERNARD L. SEGAL
MICHAEL J. MALLEY
Attorneys for Respondent

KENNETH A. LETZLER
Of Counsel

November 1977

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52. A witness in the bail reduction hearing testified of his apprehensiveness about accompanying Dr. MacDonald on a group trip because he had read about the murders of the family and the accusation against him. Transcript of bail hearing, January 29-30, 1975, at 63.

ACKNOWLEDGMENTS

Counsel for the Respondent wish to acknowledge with appreciation the assistance of lawyers and law clerks who have contributed to the present work in this case: Sara A. Simmons, Lucy B. Robins and Jennifer B. Beaver. Gratitude is also expressd to the principal secretary, Helene Krieger; and to Gary M. Reing for editorial assistance.

Appendix A

No. 75-1892

In the Supreme Court of the United States

October Term, 1977

United States of America, Petitioner

v.

Jeffrey R. MacDonald

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATE OF ARIZONA
County of Maricopa—ss.

AFFIDAVIT OF MICHAEL J. MALLEY

Michael J. Malley, 750 East Tuckey Lane, Phoenix, Arizona, 85014, having been duly sworn, deposes and says as follows:

I am an attorney admitted to practice in the courts of the State of Texas, the District of Columbia, the State of Arizona, and before this Court.

In 1970, I was an officer in the United States Army, qualified under the provisions of the Uniform Code of Military Justice to represent accused persons at courts martial. I was detailed by the Army to be one of Dr. Jeffrey R. MacDonald's military attorneys for the Article 32 investigation held during the summer of 1970 at Fort Bragg, North Carolina.

As part of my preparation for the Article 32 hearings, I had occasion to interview Miss Pamela Kalin, who was the next-door neighbor of Dr. MacDonald and his family at Fort Bragg. To the best of my recollection, the interview took place in mid to late

June, 1970, prior to the beginning of the Article 32 hearings. The interview was conducted in Miss Kalin's house, at my request, with Miss Kalin's mother present.

I informed Miss Kalin who I was and that I represented Dr. MacDonald. I told her that I would like to ask her questions about what, if anything, she knew about the night of the crimes. Miss Kalin and her mother both agreed that I could interview her on that subject. To the best of my recollection, I took notes of the interview, but I can no longer locate those notes. It is my belief that the notes were lost or destroyed over the years during the course of my various moves within the Army or afterwards.

During the course of my interview with Miss Kalin, I showed her photographs of four weapons which allegedly were used to commit the murders of Colette MacDonald, Kristen MacDonald, and Kimberly MacDonald. The photographs had been given to Dr. MacDonald's defense counsel by the Army prosecutors, and were represented to be photographs of weapons which the government would seek to show at the Article 32 hearing were the murder weapons. I have subsequently seen copies of the same photographs. These were represented to me by Brian Murtagh, a government attorney, to be photographs of weapons shown to the grand jury which indicted Dr. MacDonald, and were represented to that grand jury to be photographs of the alleged weapons.

The photographs which I showed Miss Kalin depicted an ice pick, two knives, and a club-like stick. I asked Miss Kalin specifically whether she was familiar with the MacDonald household. She said that she was because she had been a babysitter for the MacDonalds. I asked her if she had occasion ever to use any kitchen utensils at the MacDonald house, and she replied that she did. I then asked her if she recognized any of the weapons shown in the photographs. I showed her one photograph at a time,

and she replied that she recognized none of the weapons. Though she was aware that the MacDonald kitchen did contain knives, she said that she did not know if either of the photographed knives came from the MacDonald kitchen. She stated that she could not identify the photographs in any way as reminding her of any knife she may have seen in the MacDonald house.

I asked her if she recalled seeing an ice pick in the MacDonald house, and she replied that she could not recall seeing an ice pick on any occasion. She said that the photograph of the ice pick I showed her did not remind her of anything she had seen in the MacDonald house.

I showed her the photograph of the club-like stick, and again, she said that she did not recall ever seeing it in the MacDonald house.

I then asked her to recall for me what she remembered about the night of the murders. She said she didn't remember much, except that she "thought" (she reiterated that she was not sure) she heard the voice of a man sobbing in the room below hers (which she believed to be the MacDonald living room: her house was a duplex, with the upstairs bedroom she occupied being over the MacDonald living room). I asked her if she heard anything else and she replied that she did not until she was awakened by the noise of the military police arriving at the MacDonald house.

The interview lasted approximately an hour, much of which time I spent asking Miss Kalin about her knowledge of the MacDonald family relationship, which she characterized as a good and loving one. Miss Kalin's mother was present for the entire interview, and did not interrupt either me or Miss Kalin. The interview was conducted in a quiet and cordial atmosphere, and I recall going over, at least twice, many questions about the photographs and Miss Kalin's recollections of the night of the murders. I told her I wanted to be sure that she was not leaving

anything out or forgetting anything. At no time did either Miss Kalin or her mother object to my questioning her. Following the interview, I left the Kalin house, and I have seen Miss Kalin again only when she testified at the Article 32 investigation.

Following the oral argument in the Fourth Circuit in this case, and at the prodding of the panel hearing the argument, the government released to Dr. MacDonald's counsel (of whom I am still one), the transcript of Miss Kalin's 1974 grand jury testimony. I have examined that transcript with respect to the matters described above in this affidavit, and I find it to be substantially at odds with the story she told me in June, 1970, prior to the Article 32 hearing.

MICHAEL J. MALLEY
Michael J. Malley

STATE OF ARIZONA
County of Maricopa—ss.

On this the 10th day of October, 1977, before me, the undersigned officer, personally appeared MICHAEL J. MALLEY, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

BEV KAHL
Notary Public

My Commission Expires:
February 10, 1980.

Appendix B

In the Supreme Court of the United States

October Term, 1977

United States of America, Petitioner

v.

Jeffrey R. MacDonald

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATE OF CALIFORNIA
County of Alameda—ss.

DECLARATION OF JOHN I. THORNTON

I, JOHN I. THORNTON, am an associate professor of forensic science at the University of California at Berkeley. For the past seven years, I have been engaged in teaching and research in physical evidence. Previously, I had worked as a criminalist and laboratory director in the Contra Costa County crime laboratory, Martinez, California, for a period of nine years. I hold bachelor, master and doctorate degrees in forensic science from the University of California at Berkeley. I am the editor of a standard text book in physical evidence, and have authored approximately 65 journal articles describing the research in various areas of physical evidence. I am a Fellow of the American Academy of Forensic Science, and a past president of the California Association of Criminalists. I have testified as an expert witness in state and federal courts on numerous aspects of physical evidence.

I have been asked by defense counsel for Dr. Jeffrey R. MacDonald for my opinion regarding the feasibility of a reexamination of certain items of physical evidence on behalf of the defense, and the feasibility of a de novo examination of certain items of physical evidence which were collected at the scene but not examined by the prosecution's experts. In particular, I have been asked about the feasibility of such examination after

January 24, 1975, and also as of the present time, November 1977. I consider my opinion in this matter, as outlined below, to be equally as applicable to the situation as of January 1975, as it is now.

I have read and considered all of the reports of the Army CID laboratory, the FBI laboratory and the Bureau of Alcohol, Tobacco and Firearms laboratory concerning the analysis, identification and interpretation of the physical evidence in this case, which have been made available to the defense.

It is my opinion that the protracted delay from the time of collection of this evidence until January 1975, imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and that the physical evidence is not capable in all regards of being utilized by the defense.

It would be virtually impossible at this time to obtain exemplar samples of some materials, for instance candle wax that is contemporaneous in a compositional sense with materials at the time the event occurred. Should the defense seek to introduce results of the analysis of some aspects of the physical evidence, it may immediately suffer the criticism that its exemplar samples are not truly representative.

Although the ABO blood types should, given proper storage, be recoverable at this time, it is virtually certain that attempts to develop other information from the blood stains would have been futile by January 1975, and certainly no less so now. In particular, the serum types and isoenzyme types, which are exceedingly useful genetic markers and provide considerable discrimination among individuals, cannot be determined by virtue of their deterioration with time. The availability of such test results could be of value in assisting the defense.

The foregoing declaration is made under penalty of perjury.

JOHN I. THORNTON
John I. Thornton

Appendix C

In the United States District Court
Eastern District of North Carolina
Raleigh District

GRAND JURY INVESTIGATION
IN THE MATTER OF:

THE DEATHS OF
COLETTE MACDONALD,
KIMBERLY MACDONALD, and
KRISTEN MACDONALD

APPEARING:

For the United States Government:

Victor Woerheide, Department of Justice
James T. Stroud, Asst. U. S. Attorney

WITNESS: PAMELA KALIN

At Raleigh
August 27, 1974

[11] Q. All right. What time would you say that was?
A. Between——I think about eleven o'clock.
Q. About eleven?
A. [Nod affirmatively]
Q. You were in bed at the time just before going to sleep.
A. [Nod affirmatively]
Q. Is that right?
A. Right.
Q. Did you hear any other noises prior to going to sleep?
A. No.
Q. Did you sleep through the night or were you awaken by something?
A. I awoke. At first by an angry voice.

Q. Male or female?

A. Male.

Q. Did you recognize the voice?

A. I thought who else could be down there but Jeff. That's all I thought.

Q. So you assumed that it was Jeff's voice?

A. Right.

Q. Can you say about what time this was?

A. No. I can't.

Q. Do you have any idea how long——were you in a deep [12] sleep at that point?

A. Yes.

Q. What about the voice do you remember, other than it was loud——what did you say? Loud, angry voice?

A. It was angry and cruel I think.

Q. And it was loud I assume since it awakened you.

A. There were tones. There were higher tones, angry tones than——you could tell that it was an angry conversation because there were higher tones.

Q. You mean higher in volume.

A. [Nod negatively]

Q. Or pitch?

A. In volume.

Q. Did you hear more than one voice at that time?

A. I don't remember.

Q. You say one was higher? Was it higher in relation to what else?

A. Maybe another voice. I don't remember.

Q. I believe when you and I discussed it prior you said that you felt like either before or after you heard that voice there was some lower tone like another voice. Is that right?

A. I don't know.

Q. But you're not real sure?

* * * * *

[22] A. No.

Q. Did you have occasion to be in the kitchen and in the utility room on several occasions?

A. Yes.

Q. Did you ever see any type of weapons in the house?

A. No.

Q. Now directing your attention to this club that's already been admitted, marked as an exhibit, is there anything about this club that rings a bell with you or that is familiar? This piece of wood.

A. Just the splattered paint, but not the piece of wood.

Q. The paint somehow rings a bell with you?

A. [Nod affirmatively]

Q. The color or the pattern of the paint? Or what?

A. The pattern.

Q. But the piece of wood itself does not?

A. No.

Q. Now referring you to the knife and—that is attached—the knife that is in a plastic bag that is attached to the ice pick that is in a plastic bag. The knife which has on it the prining "Stainless—Geneva Forge, USA." Do you recognize that knife?

A. No.

Q. Is there anything about it that is familiar to you?

A. I believe that my family had a color—one the same [23] color in a small one like that, but not the end shape and not the bent blade, but the color and the size of it.

Q. Do you have any recollection as to a knife like this in the MacDonald residence?

A. No.

Q. Did you ever do any dishes, wash dishes in the MacDonald residence?

A. Yes.

Q. On how many occasions if you can recall?

A. Three or four.

Q. This would be—what? Dishes left over from supper?

A. Right.

Q. Now, how about the ice pick? Do you recognize it?

A. No.

Q. Did the MacDonalds have an ice pick in their residence?

A. I think so.

Q. You think so.

A. [Nod affirmatively]

Q. Do you have any recollection as to where it was kept?

A. No.

Q. Do you have any recollection as to whether or not there was a drawer in the kitchen that was specifically for knives and kitchen utensils as opposed to silverware? Like in our house, for example, we've got one [24] drawer where we keep our silverware, like stainless steel eating utensils and then in another drawer we keep knives, like butcher knives or paring knives, and egg beater and this type stuff. What about in the MacDonald residence? Do you have a recollection to that?

A. No.

Q. Now referring you to the other knife which has imprinted on it and the handle, the wooden handle, "Old Hickory". Can you recognize that knife?

A. I think.

Q. You think?

A. [Nod affirmatively]

Q. What is there about this knife that you recognize?

A. The lettering.

Q. The "Old Hickory"?

A. [Nod affirmatively]

Q. On the handle?

A. [Nod affirmatively]

Q. Is there anything else about this as far as the coloring, the size, the shape?

A. The color.

Q. How about just the shape and design of it? Does that in any way ring a bell with you?

A. No.

[25] Q. All right. From where do you recognize it?

A. I'm not sure if it was a—I baby-sat a lot there and I don't know if I saw it at a baby-sitting house or friend's house or—I don't remember.

Q. Can you in any way connect it with the MacDonald residence?

A. I thought they had one with handles on their knives, but I don't remember.

Q. When you and I were talking yesterday, I believe, at least you gave me the impression that you did recognize it and that you felt like you recognized it from the MacDonald household. Is that not your recollection or is it?

A. I'm not sure.

Q. You're not sure?

A. [Nod negatively]

Q. Would it have been from your house? Did you have a knife like that?

A. No.

Q. How many places did you baby-sit?

A. About ten different places

Q. And you can't be more specific about where you would recognize them from?

A. No.

* * * * *

[36] FURTHER EXAMINATION BY MR. STROUD:

Q. Okay. I would like to remind you, Miss Kalin, that you are still under the oath that you took earlier in the day to tell the truth. Okay.

A. Right.

Q. Now after you were here earlier in the day and I questioned you, at my request, Mr. Murtagh, who is working with us,

went through some photographs of the house with you to see if this would bring back anything to you, recharge your memory in any way. Is that right?

A. Right.

Q. Now, also with reference to some other questions that I have of you, I believe you stated to me yesterday, that you really hadn't thought of this matter, the incident, the circumstances surrounding it with regard to the death of the wife and two children in the MacDonald family. You haven't really given it much thought since the occurrence four years ago. Is that right?

A. No. I've kept it out of my mind.

Q. Now since—and I've talked with you a good while yesterday and again this morning. As we were going through this and as I was asking you questions, did you find things coming back to your memory?

[37] A. Yes.

Q. That previously you had not thought of?

A. Yes.

Q. Now it is my understanding at this point that you have some further recollection which came to you today with regard to the ice pick which I earlier asked you about in the day. Is that right?

A. Right.

Q. Would you go ahead and state for the Grand Jury what that recollection is, please?

A. I remember using the ice pick that was on top of the refrigerator to get popsicles and ice cream out of the freezer which was always very full and I needed to break the ice away in order to get the popsicles out or whatever.

Q. Is there anything in particular that jogged your memory about that, about the popsicles and the ice pick?

A. Just—No. I was just relaxed after being here, and all of a sudden I just remembered it. I thought I recognized the ice pick, but it never really occurred to me.

Q. All right. Were you tense when you were before the Grand Jury earlier?

A. Yes.

Q. Are you tense now?

[38] A. No.

Q. So you say during a period of relaxation after being before the Grand Jury it came back to you? This recollection?

A. Right.

Q. Have there been any other recollections that came back to you.

A. No.

Q. Now showing you this ice pick now, I believe earlier in the day you said that you thought, as I recall your testimony, you thought that they had an ice pick in the house. Right?

A. Right.

Q. Right now you are sure they had an ice pick in the house and that the ice pick was kept on top of their refrigerator? Is that right?

A. Yes.

Q. Can you recall actually using the ice pick to get something out of the freezer?

A. Yes.

Q. On how many occasions?

A. Twice that I remember. I don't know other than that.

Q. And you are sure that this was in connection with the MacDonald residence?

A. Yes.

[39] Q. Now do you have any further recollection about being able to identify this particular ice pick?

A. The color.

Q. The color?

A. The light color of it.

Q. All right, now. So I take it you cannot say that this was the ice pick, but was it an ice pick like this one? In color, shape, and design?

A. Yes.

Q. That was in the house?

A. [Nod affirmatively]

Q. Now has anybody put that thought in your mind or is it something that you came to on your own?

A. I came to on my own.

Q. Now, did you see the ice pick in the house, anywhere other than on top of the refrigerator?

A. Not that I can remember, no

Q. But that's where it was normally kept? Is that a proper understanding?

A. Right.

Q. Now, can you recall——you talk about other places that you baby-sat at, can you recall there being an ice pick at any of those places?

A. No.

Q. Can you recall that there was not that you were aware [40] an ice pick at any of those places?

A. I never found any if there were.

Q. How about in your own house? Did you have an ice pick there?

A. Yes.

Q. What type was it in relation to this type?

A. It was an old one and it was painted. They painted it. It was bought painted and the paint was all chipped off. And it was a dark color. Gray and black, or something.

Q. I believe earlier that you told me that it also had a ring on the end of it.

A. Yes.

Q. And the handle where you could hang it on something.

A. Right.

Q. Where did you keep the ice pick in your home?

A. Where you put the ice cubes, where you open the freezer door inside the freezer.

Q. Did you ever see this ice pick used by anyone else in the MacDonald household?

A. No.

Q. Or one that looked like this one.

A. No.

Q. All right. I have one other question with regard to the rocking chair in the living room in relation

FOR ARGUMENT

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UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In our opening brief, we set forth in some detail why a pre-trial order denying a motion to dismiss an indictment on speedy trial grounds meets none of the criteria of the "collateral order" exception to the final judgment rule and thus cannot be appealed in advance of trial. Respondent makes little effort to take issue with our analysis, instead relying largely on the erroneous notion that the Speedy Trial Clause creates "a right not to be tried" (Br. 35) and asserting that, in any event, his case does not fit within the normal mold of speedy trial claims.[1] Our initial discussion

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[1]For example, respondent contends (Br. 33) that the threshold requirement of a "fully consummated decision" (*Abney* v. *United States*, 431 U.S. 651, 659) was satisfied here because "[t]here is nothing tentative about [the district court's] ruling. It does not, on its face or by implication, indicate that anything which might later happen at trial could affect it." Even assuming that respondent's interpretation of the trial judge's decision is correct, the fact remains that the determination whether an order is an appealable final decision under 28 U.S.C. 1291

fully answers respondent's submission on the jurisdictional issue, and we will therefore not reiterate those arguments. We believe, however, that respondent's claim that the pre-indictment delay in this case violated his Sixth Amendment right to a speedy trial deserves a short response.

1. Relying on *Klopfer* v. *North Carolina*, 386 U.S. 213, respondent contends (Br. 42-44) that his Sixth Amendment right to a speedy trial irrevocably attached with his arrest on three specifications of murder by the Army in April 1970 and was not disengaged when those charges were dismissed in October 1970. He therefore argues that the Speedy Trial Clause was implicated by the entire delay between April 1970 and his scheduled trial date on the indictment returned in January 1975, despite the fact that no charges were pending against him during the four year interval between the dismissal of the military charges and the issuance of the indictment. This is so, he urges, because even after the military charges had been dropped he continued to suffer general anxiety and concern over the prospect that he might be prosecuted by the federal government at some future date and he was forced to retain counsel to protect his interests.

As we observed in our opening brief, however, *Klopfer* offers no support for respondent's position. Respondent continues to ignore the critical distinction between this case and *Klopfer*, where the defendant had been under indictment for the entire period of the delay that was held to violate the Sixth Amendment.

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must be made in light of "the generality of cases" (*Carroll* v. *United States*, 354 U.S. 394, 405) and "cannot depend upon the facts of a particular case" (*ibid.*). Respondent does not dispute our assertion that it would be the rare case involving substantial pre-trial delay in which the various factors listed in *Barker* v. *Wingo*, 407 U.S. 514, could be intelligently assessed prior to trial.

We submit that *United States* v. *Marion*, 404 U.S. 307, rather than *Klopfer*, should control the outcome of this case. In our opening brief, we invited respondent to distinguish his status after the dismissal of the military charges from that of the defendants in *Marion*, who, like respondent, were aware well before their indictment that they were the focus of an ongoing criminal investigation, were the subject of widespread public speculation that they had been involved in criminal wrongdoing, and were obligated to incur legal expenses as a result of the government's inquiries. Respondent has understandably declined that invitation, for no plausible distinction can be drawn. This Court recognized in *Marion* that an individual who is the publicized target of a criminal investigation inevitably suffers harmful emotional and financial consequences during the pendency of the investigation (404 U.S. at 320), but it nevertheless held that the "particular protections" (*ibid.*) of the Speedy Trial Clause did not attach until a formal criminal charge has been brought. Precisely the same analysis compels the conclusion that respondent's Sixth Amendment right was not implicated during the period between October 1970 and January 1975.

2. We argued in our brief that respondent has failed to demonstrate any actual prejudice to his defense as a result of the delay prior to his indictment. Respondent has now attempted to remedy this deficiency by introducing materials (Br. App. A and B) that were not submitted to either the district court or the court of appeals and are consequently not part of the record in this case. Although we believe that this supplementation is improper, respondent's belated efforts to document his claim of actual prejudice are in any event unpersuasive.

a. Respondent first relies upon an affidavit from one of his attorneys (Br. App. A), stating that Pamela Kalin, the babysitter for respondent's children, had been unable to

identify any of the murder weapons when she was interviewed immediately after the crimes but was able five years later to testify before the grand jury that the ice pick used to stab Colette MacDonald was similar to one she had used at respondent's residence. This change in the babysitter's recollection of pertinent facts, according to respondent, constitutes "telling confirmation of the danger of altered memories" caused by the delay in procuring the indictment (Br. 53). Respondent's complaint, however, is not that Kalin's memory has deteriorated over time but rather that her present recollection is quite unfavorable to him. Although we do not dispute that respondent's chances for an acquittal could be damaged if Kalin were to testify at trial as she did before the grand jury, this Court has never suggested that a strengthening of the government's case during a period of delay is the kind of "prejudice" against which the Speedy Trial Clause was intended to protect. Rather, it is the destruction of evidence favorable to the defense or the loss of memory by *defense* witnesses (*Barker* v. *Wingo, supra*, 407 U.S. at 532) that is significant for speedy trial purposes.

Perhaps more important, respondent's claim only serves to reinforce our contention that it is ordinarily impossible in advance of trial to determine accurately the degree to which defense capabilities may have been impaired by a pre-trial delay. Respondent will have been "prejudiced" only if (1) Kalin testifies at his trial, (2) she reaffirms her grand jury testimony, (3) defense efforts to impeach that testimony with her prior inconsistent statements are unavailing, (4) there are no other witnesses presented to corroborate her testimony,[2] and (5) respondent is

[2]In fact, the government expects two other persons (Capt. Ronald Harrison and Mildred Kassab), both of whom were interviewed immediately after the murders, to corroborate Kalin's testimony about the icepick (G.J. Harrison 14-15; G.J. Kassab 52-53).

convicted. At this juncture, however, it is sheer speculation to predict whether any of these conditions will be satisfied at respondent's trial.

b. Respondent also contends (Br. 56) that "important, sophisticated tests for the accurate identification of the blood and other physical evidence were not made by the government and are no longer possible by the defense because of * * * deterioration and changes in the physical evidence during the unjustified five-year delay in this case." In support of this claim, respondent has submitted the affidavit of Dr. John Thornton, a forensic scientist (Br. App. B), which states that, at the time of respondent's indictment in January 1975, it would not have been possible to analyze the blood stains found at the crime scene for their "serum types and isoenzyme types, which are exceedingly useful genetic markers and provide considerable discrimination among individuals, * * * [because] of their deterioration with time" (*id.* at 6).[3]

We doubt that this is the proper forum in which these allegations should be considered for the first time. We note, however, that respondent has failed to mention that the methodology for detecting serum proteins and isoenzyme factors in dried blood stains was not employed by any criminalistics laboratory in the United States during the period in which such testing could have been performed on the blood stains from respondent's residence. It is our understanding that information concerning these techniques of blood typing was not widely disseminated in this country until 1972, two years

[3]Analysis for serum and isoenzyme types permits discrimination between persons having the same blood-type under the accepted A-B-O genetic marker system for the identification of dried blood stains.

after the stains involved in this case came into existence.[4] Furthermore, even if this technology had been available and practiced in the United States before that time, it would have been necessary to perform the tests within a year or less after the crimes, because the blood factors with which serum protein and isoenzyme analyses are concerned do not persist for more than a few weeks or months after the formation of blood stains.[5]

Thus, while it is true that such tests could not have been performed as of the date of respondent's indictment in 1975, it is a distortion of the facts to rely upon that conclusion as evidence that respondent has suffered actual prejudice as a result of the passage of time between the C.I.D.'s referral of respondent's case to the Department of Justice in June 1972 and his indictment in January 1975. Respondent would have been unable to perform the blood tests now suggested by Dr. Thornton, and presumably would have suffered the same "prejudice," had he been indicted and tried in 1972, a time at which even respondent concedes there would have been no Sixth Amendment bar to his prosecution.[6]

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[4]To our knowledge, these techniques first received attention in the United States in a monograph published by the Law Enforcement Assistance Administration in December 1971. See B.J. Culliford, *The Examination and Typing of Bloodstains in the Crime Laboratory* (1971), a copy of which we are lodging with the Clerk of this Court.

[5]See generally C.G. Denault, H.H. Takimoto, Q.Y. Kwan, and A. Pallos, *Detectability of Selected Genetic Markers In Dried Blood Upon Aging* 4 (September 1976). We are lodging a copy of this report with the Clerk of this Court.

[6]This error pervades respondent's entire discussion of the prejudice he has allegedly suffered because of the pre-trial delay. Thus, his complaint that "there was a total failure to protect the crime scene from disturbance" (Br. 2) and that, as a result, flower pots, pajama tops and bedding were negligently moved (Br. 3, 53) and fingerprints

The technology that was available at the time respondent's wife and children were murdered permitted classification of the blood stains under the established A-B-O genetic marker system. Each of the stains in respondent's apartment was analyzed and classified under that system during the C.I.D.'s initial investigation of the crimes.[7] As Dr. Thornton's affidavit points out, typing of the blood stains under this system is still possible today, should respondent wish to challenge the results of the earlier tests. Respondent's argument about the blood stains, however, seems decidedly to have been an afterthought: although respondent obviously has always known about the dried blood stains and has been aware since mid-1970 that A-B-O grouping tests had been done by the C.I.D., and although the investigating officer at the Article 32 hearing ruled favorably on his motion to have all of the physical evidence made available for testing by defense experts, respondent has never sought to have any tests performed on the blood stains (E-8, at 485-486; E-21, at 658; E-57).

c. Dr. Thornton's affidavit also asserts that "[i]t would be virtually impossible at this time to obtain exemplar samples of some materials, for instance candle wax that is contemporaneous in a compositional sense with materials at the time the event occurred" (Br. App. B 6). The relevance of this allegation to respondent's claims of prejudice is puzzling.

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destroyed (Br. 3-4), ignores the fact that these events had already transpired (and these charges could equally have been levelled) within five weeks, not just five years, after the crimes and hence are not attributable to any governmental delay. In any event, hundreds of photographs of respondent's apartment were taken on the day of the crimes, so there would be no need at trial to rely on the recollections of witnesses.

[7]Each of the victims and respondent had a different one of the only four blood types (A, AB, B, O) (A. 135), thus facilitating attempts to identify specific blood stains with family members.

At one time, respondent contended that one of the intruders who had allegedly murdered his family had carried a lighted candle (A. 151). Wax drippings were found in several places around respondent's residence, including on the bedclothes in Kimberly's bedroom, although not in the area where respondent claimed the candle carrier had stood. During the early stages of the investigation, the chemical composition of the drippings was compared with the wax in six candles found at the crime scene, and it was determined that none of the candles was the source of the drippings (A. 157).[8] Thus, the most favorable result that respondent could hope to produce through new testing of the wax drippings is precisely what the government's own examination established long ago—namely, that the drippings did not come from any known source of wax in respondent's residence and, hence, may have come from wax brought by an intruder. We therefore fail to comprehend how respondent's asserted inability to perform certain new tests on the wax could conceivably have prejudiced his defense.

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss respondent's appeal for lack of jurisdiction.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[8]These candles are still in existence.